LEGAL RECREATIONS,

OR

POPULAR AMUSEMENTS

IN THE

LAWS OF ENGLAND.

BY A BARRISTER AT LAW.

VOL. I.

HARVARD LAW SCHOOL LIBRARY.

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OMNIA NOS ITIDEM——————————LUCR. Virgil.

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PREFACE.

NOTHING is more generally aſſerted, and nothing with leſs qualification admitted, than that the laws of *England* are in their nature rugged, and abſtruſe, and that they open to the mind of a ſtudent the proſpect of a laborious and diſcouraging progreſs.

It muſt be admitted, that with reſpect to the greater part of the various branches of the law this deciſion is founded in truth, but every ſtudent will acknowledge that in the courſe of his toilſome journey, his attention has been ſometimes forcibly arreſted, his imagination diverted, and his reaſon highly gratified with curious, amuſing, and intereſting topicks, which threw a luſtre over the ſurrounding gloom.

Theſe pleaſing pages are but thinly ſcattered through the lawyers library, and the wearied mind lights on them, as the traveller lights on the ſtream and the ſhade in the ſun-burnt waſtes

waſtes of the eaſt. Through theſe extenſive tracts of learning, no lawyer has as yet travelled with a view of ſelecting the ſolitary beauties and curioſities that occur, and of collecting them into a diſtinct body for the entertainment and inſtruction of ſuch as do not travel the ſame journey. This taſk the compiler of the following work has undertaken.

His original plan, was an arrangement of the whole under heads in alphabetical order, and in this manner the work had attained to a conſiderable ſize, but after much reflection on its adaptation in this form to the minds of readers in general, it was thought more conſiſtent with the nature and object of the publication, to reject all ſyſtem whatever, as tending to tedioufneſs, and to enliven attention by variety, as the only plan on which it could be rendered univerſally attractive.

To each title, a commentary is prefixed, where requiſite to prepare the mind for the ſubject; and at the end of each volume an alphabetical table of contents, and a very copious index are inſerted, by means of which, each particular head, although disjoined in the body of the work, for the purpoſe of relieving the mind, may be connected together, and the reader enabled to purſue any ſubject at his pleaſure.

Recourſe has been had, not only to the whole body of reports and miſcellaneous books

in

in the law, but alſo to the State Trials: in which are interſperſed through eleven folio volumes, among a prodigious quantity of unintereſting matter and tedious detail, ſome proſecutions, which from their political and hiſtorical importance ought to be familiar to every Engliſhman, ſome of ſingular curioſity, and ſome which would fill the hour of leiſure with the moſt intereſting and inſtructive amuſement: of theſe, the generality of readers have in conſequence of the number and bulk of the volumes in which they are ſcattered remained in ignorance, and even ſome profeſſional readers have not been ſo converſant in them as might be expected; they have therefore been ſelected with care, ſtripped of every ſuperfluous appendage, and form in their turn a part of this compilation.

"I think it" (ſays Sir *William Blackſtone*, in his Commentaries on the Laws of *England*) "an undeniable poſition, that a competent knowledge of the laws of that ſociety in which we live, is the proper accompliſhment of every gentleman and ſcholar; an highly uſeful, I had almoſt ſaid eſſential part of liberal, and polite education."

The learned commentator here expreſſes himſelf very generally with reſpect to a knowledge of the laws, being a part of liberal and polite education: in a ſubſequent page however, he makes the requiſite diſtinction between

tween ſuch as do, and ſuch as do not intend to practiſe the profeſſion; for ſays he, "ſome branches of the law, as the formal proceſs of civil ſuits, and the ſubtile diſtinctions incident to landed property, which are the moſt difficult to be thoroughly underſtood, are the leaſt worth the pains of underſtanding, except to ſuch gentlemen as mean to purſue the profeſſion." A due regard is, in this publication, paid to this diſtinction, and all thoſe branches are ſtudiouſly avoided, which from their nature ſeem excluſively appropriated to the mind of a practitioner.

To readers not deſigned for the profeſſion, the name of a law book carries with it repulſion and diſguſt, and comparatively but few, have extended their attention even through theſe Commentaries, the peruſal of which, though compleat as a theoretic ſyſtem of *Engliſh* Law, requires to be followed by a peruſal of actual caſes, diſcuſſions and deciſions, to render the impreſſions received, diſtinct, and uſeful: theſe convey a livelier intereſt to the mind, the underſtanding is invigorated, and amuſed by diſputation, and independent of the queſtion agitated, much incidental knowledge is acquired. The misfortune however, has been that after the author of the commentaries had been read, the whole catalogue of law books did not furniſh another ſuited to the mind of one who was in purſuit only of that knowledge which might pro-

perly rank among the liberal attainments: the following work ſeems calculated to anſwer this deſirable purpoſe, and as theſe branches of this deſcription, contained in the commentaries, are frequently neceſſary by way of introduction, illuſtration or explanation, inſtead of referring to the author, the paſſages are in general inſerted for the greater eaſe of the reader.

Judicial deciſions of general concern have always poſſeſſed a powerful influence over public attention, but in a little while they die under the preſſure of new occurrences, are remembered no more, and lie buried in the immenſe catacomb of law reports, never again to be contemplated but by the ſtudious of a ſingle profeſſion. It is no leſs a matter of wonder, than of regret, that hitherto there has been no attempt to form a popular repoſitory for the reception of ſuch legal ſubjects, as are of common intereſt, entertainment and curioſity, to which every man might recur for general inſtruction, particular information, or as to an amuſing publication, added to the catalogue of friendly reſources to mitigate the miſeries of a mind unemployed.

Could this work contribute to theſe deſirable ends, it will contribute proportionably to the compiler's happineſs: he is ſenſible that what is due to the merit of ſelection, to the careful attention and abſtract recurrence to unprofeſſional

unprofeſſional minds, requiſite to mould a legal ſubject for general comprehenſion, may be loſt in the contemplation of the drudgery of compilation; but when theſe diſcouraging reflections are balanced againſt the ſatisfaction ariſing from having opened to all readers ſo pleaſing and novel a ſource of uſeful knowledge, and rational entertainment, he becomes reconciled to the undertaking, and leaves the reſt to public deciſion.

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LEGAL RECREATIONS, &c.

TENURES.

ALMOST all the landed property of this kingdom is by the policy of our laws, ſuppoſed to be granted by, dependant upon, and *holden* of ſome ſuperior lord, by and in conſideration of certain ſervices to be rendered to the lord by the tenant or poſſeſſor of this property. The thing holden is therefore ſtiled a *tenement*, the poſſeſſors thereof *tenants*, and the manner of their poſſeſſion a *tenure*. Before the eſtabliſhment of the feudal ſyſtem, the poſſeſſions of the people were perfectly *allodial* (that is wholly independent, and held of no ſuperior at all) but by that conſtitution, large parcels of land were allotted by the conquering generals to the ſuperior officers, and by them dealt out again in ſmaller parcels to the inferior officers, and moſt deſerving ſoldiers, who were all bound to each other for reciprocal protection and defence.

In conſequence of this ſyſtem, it became a fundamental maxim, and neceſſary principle (though in reality a mere fiction) of our Engliſh tenures, "That the king is the uni-"verſal lord, and original proprietor of all the land in the "kingdom; and that no man doth, or can poſſeſs any part "of it, but what has mediately or immediately been de-"rived as a gift from him, to be held upon feudal ſervices." Thoſe that held immediately under the crown, were called the king's tenants in *capite*, or in chief, which was the moſt honourable ſpecies of tenure: thoſe who in a lower degree of feudatory ſubordination held of their lords, were ſubject to ſervices of a more ſlaviſh nature. Theſe ſervices gradually grew into a ſlavery ſo complicated and extenſive as to call aloud for redreſs, and at length by an act made in 12 Charles II. c. 24, A. D. 1660. the whole were levelled at one blow, every oppreſſive tenure being aboliſhed, except only tenures in frankalmoign (which is, where a religious corporation holds lands from the giver in free alms), copy-

holds, and the honorary ſervices of Grand Serjeanty. The tenure by *Grand Serjeanty* thus reſerved, and ſtill exiſting, is whereby the tenant is bound, inſtead of ſerving the king generally in his wars, to do ſome ſpecial honorary ſervice to the king in perſon; as to carry his banner, his ſword, or the like; or to be his butler, champion, or other officer at his coronation. *Petit Serjeanty*, which alſo ſtill exiſts, bears a great reſemblance to grand ſerjeanty; for as the one is a perſonal ſervice, ſo the other is a rent or render, both tending to ſome purpoſe relative to the king's perſon. Petit Serjeanty, conſiſts in holding lands of the king, by the ſervice of rendering to him annually ſome ſmall implement of war, as a bow or ſword, a lance, an arrow, or the like. And lands may be held, not only of the king, but of ſubjects who poſſeſs the franchiſe, to whom the tenants render ſervices of the nature of Grand and Petit Serjeanty.

Having premiſed thus much, we will ſelect ſuch inſtances of tenures, as are moſt curious and remarkable.

WORKSOP.——County of NOTTINGHAM.

King Henry VIII. in the 33d year of his reign, granted to George Talbot, earl of Shrewſbury, the ſcite and precinct of the monaſtery of Worksop, with its appurtenances, in the county of Nottingham; to be held of the king in *capite*, by the ſervice of the tenth part of a knight's fee [a]; and by the royal ſervice of finding the king a *right hand glove* at his coronation, and to ſupport his *right arm*, that day, as long as he ſhould hold the ſcepter in his hand; and paying yearly 23l 8s 0½d.

At the coronation of king James II. this ſervice was claimed and allowed.—And at the coronation of his preſent majeſty George III. the ſame ſervice was performed by the moſt honourable Charles, marquiſs of Rockingham, as deputy to the duke of Norfolk, lord of the manor of Worksop.

HEYDON.——County of ESSEX.

At the coronation of King James II. the lord of the manor of Heydon in Eſſex, claimed to hold the *baſon and ewer* to the king, by virtue of one moiety, and the *towel*, by virtue of another moiety of the ſaid manor, when the king waſhes before dinner.—Which claim was allowed as to the towel only.

BARDOLFE.——County of SURRY.

And at the coronation of the ſame king the lord of the manor of Bardolfe in Addington, Surry, claimed to find a

[a] A knight's fee in the reign of Edw. II. amounted to 20l.

man

man to make a meſs of *grout* in the king's kitchen; and therefore prayed that the king's Maſter Cook might perform that ſervice. Which claim was allowed, and the ſaid lord of the manor brought it up to the king's table.

LISTON.——County of ESSEX.

In the 41ſt of Edward III. Joan, the wife of William Leſton, held the manor of Overhall in this pariſh, by the ſervice of paying for, bringing in and placing of five *wafers* before the king as he ſits at dinner upon the day of his coronation.

At the coronation of King James II. the lord of the manor of Liſton in Eſſex, claimed to make *wafers* [redacted] the king and queen, and ſerve them up to their table; to have all the inſtruments of *ſilver* and other *metal*, uſed about the ſame, with the *linen* and certain proportions of ingredients, and other neceſſaries, and *liveries* for himſelf and two men. Which claim was allowed, and the ſervice, with his conſent, performed by the king's officers, and the fees compounded for at 30l.

At the coronation of their preſent majeſties, William Campbell of Liſton Hall, Eſquire, as lord of this manor, claimed to do the ſame ſervice, which was allowed; and the king was pleaſed to appoint his ſon, William Henry Campbell, Eſquire, to officiate as his deputy, who accordingly attended and preſented the *wafers* to their majeſties.

WINTERSLEW.——County of WILTS.

John de Roches holds the manor of Winterſlew in the county of Wilts by the ſervice, that when our lord the king ſhould abide at Clarendon, he ſhould come to the palace of the king there, and go into the butlery, and draw out of any veſſel he ſhould find in the ſaid butlery, at his choice, as much wine as ſhould be needful for making a *Pitcher of Claret*, which he ſhould make at the king's charge; and that he ſhould ſerve the king with a *cup*, and ſhould have the veſſel from whence he took the wine, with all the remainder of the wine left in the veſſel, together with the cup from whence the king ſhould drink that *claret*.

COPERLAND, and ATTERTON.——County of KENT.

Solomon Attefeld held land at Keperland and Atterton in the county of Kent, that as often as our lord the king would croſs the ſea, the ſaid Solomon and his heirs ought to go along with him, to hold his *head* on the ſea, if it was needful.

HEMINGSTON.——County of SUFFOLK.

Rowland le Sarcere held one hundred and ten acres of land in Hemingſton in the county of Suffolk, by ſerjeanty; for which, on Chriſtmas day, every year, before our ſovereign lord the king of England, he ſhould perform, altogether, and once, a *leap*, a *puff*, and a *f—t*; (or, as Mr. Blount has it, he ſhould *dance*, *puff up his cheeks*, making therewith a ſound, and let a *crack*;) and, becauſe it was an indecent ſervice, therefore it was rented, ſays the record, at 26s 8d a year, at the king's exchequer.

One Baldwin, alſo, formerly held thoſe lands by the ſame ſervice; and was called by the nickname of Baldwin le Pettour.

OVENHELLE.——County of KENT.

Sir Oſbert de Longchamp knight, holds certain land which is called Ovenhelle, in the county of Kent, by the ſervice of following our lord the king in his army into Wales forty days, at his own coſts, with a *horſe* of the price of five ſhillings, a *ſack* of the price of ſixpence, and with a *needle* to the ſame *ſack*.

MORTON.——County of ESSEX.

Henry de Averyng holds the manor of Morton in the county of Eſſex, in *capite* of our lord the king, by the ſerjeanty of finding one *man* with a *horſe*, of the price of ten ſhillings, and four *horſe ſhoes*, and one *leather ſack*, and one *iron jug*, as often as it ſhould happen for the king to go into Wales with his army, at his own charges for forty days.

LEWE.——County of OXON.

Robert de Eylesford holds three yard-lands[a] in Lewe in the county of Oxford, of our lord the king, by the ſervice of finding a *man*, with a *bow* and *arrows*, for forty days, at his own proper coſts, whenſoever it ſhould happen that the king went into Wales with his army.

CHETTINGTON.——County of SALOP.

Roger Corbet holds the manor of Chettington in the county of Salop, of the king in *capite*, by the ſervice of finding one *footman* in time of War, in the king's army in Wales, with one *bow* and three *arrows*, and one *pale*, and carrying with

[a] Yard-land is a quantity of land, different, in different places, at Wimbleton in Surrey, it is fifteen acres, in other counties it is twenty, in ſome twenty-four, and in others thirty or forty acres. *Bracton*, lib. 2, c. 10.

with him one *bacon* or *ſalted hog*; and when he comes to the army, delivering to the king's marſhall a moiety of the *bacon*: and thence the marſhall was to deliver to him daily, ſome of that moiety for his dinner, ſo long as he ſtayed in the army; and he was to follow the army ſo long as that half of the bacon ſhould laſt.

BRINESTON.——County of CHESTER, or DORSET.

The manor of Brineſton in the County of Cheſter, is held of the king in *capite*, by the ſervice of finding a man in the army of our lord the king, going into the parts of Scotland, *barefoot*, clothed with a *ſhirt* and *breeches*, having in one hand a *bow without a ſtring*, and in the other an *arrow unfeathered*.

LOSTON.——County of DEVON.

William de Albemarle holds the manor of Loſton, by the ſerjeanty of finding for our lord the king, two *arrows* and one *loaf* of *oat bread*, when he ſhould hunt in the foreſt of Dartmore.

BROKENERST.——County of HANTS.

Peter Spileman paid a fine to the king for the lands which the ſaid Peter held by the ſerjeanty of finding an Eſquire with a *hambergell*, or *coat of mail*, for forty days in England, and of finding *litter* for the king's bed, and *hay* for the king's palfrey, when the king ſhould lie at Brokenerſt in the county of Southampton.

AYLESBURY.——County of BUCKS.

William, ſon of William de Aleſbury, holds three yard-lands of our lord the king in Aleſbury in the county of Bucks, by the Searjeanty of finding *ſtraw* for the *bed* of our lord the king, and to *ſtraw his chamber*, and by paying three *eels* to our lord the king, when he ſhould come to Aleſbury in winter. And alſo finding for the king, when he ſhould come to Aleſbury in ſummer, *ſtraw* for his *bed*, and moreover *graſs* or *ruſhes* to ſtrew his chamber, and alſo paying two *green geeſe*; and theſe ſervices aforeſaid, he was to perform thrice a year, if the king ſhould happen to come three times to Aleſbury, and not oftener.

STOW.——County of CAMBRIDGE.

John de Curteſe held thirty acres of land in Stow in the county of Cambridge, by the ſerjeanty of carrying a *truſs of hay* to the *neceſſary houſe* of our lord the king, when the king paſſed through thoſe parts, and it is rated at the exchequer at ten ſhillings a year.

YARMOUTH.

YARMOUTH.——County of NORFOLK.

This town, by charter, is bound to ſend to the ſheriffs of Norwich a hundred *herrings*, which are to be baked in *twenty-four pies or paſties*, and thence delivered to the lord of the manor of Eaſt-Carlton, who is to convey them to the king.

CARLTON.——County of NORFOLK.

Euſtace de Corſon, Thomas de Berkedich, and Robert de Wethen, hold thirty acres of land in the town of Carlton in the county of Norfolk, by the ſerjeanty of carrying to our lord the king, whereſoever he ſhould be in England, *twenty four pyes of freſh herrings* at their firſt coming in.

WINGFIELD.——County of SUFFOLK.

Geoffrey Frumband held ſixty acres of land in Wingfend in the county of Suffolk, by the ſervice of paying to our lord the king two *white doves* yearly.

FINCHINGFIELD.——County of ESSEX.

John Compes held this manor of king Edward III. by the ſervice of *turning the ſpit* at his coronation.

BOROUGH of GUILDFORD.——County of SURRY.

Robert Teſtard held certain land in the town of Guildford, by ſerjeanty of keeping the *whores* in the court of our lord the king. And it is ſet at 25s a year rent.

Thomas de la Puille holds one ſerjeanty in the town of Guldeford of the gift of Richard Teſtard, for which he formerly uſed to keep the *laundreſſes* of the king's court; and now he pays at the exchequer 25s.

BOCKHAMPTON.——County of BERKS.

William Hoppeſhort holds half a yard-land in that town of our lord the king, by the ſervice of keeping for the king *ſix damſels*, to wit, *whores*, at the coſt of the king.—This was called pimp-tenure.

GATESHILL.——County of SURRY.

Robert de Gatton holds the manor of Gateſhill in the county of Surrey, by the ſerjeanty of being *marſhall* of twelve *girls* who followed the king's court.

Hamo de Gatton holds the manor of Gateſhull in the county of Surrey, of our lord the king, by ſerjeanty of being *marſhall* of the *whores*, when the king ſhould come into thoſe parts. And he was not to hold it but at the will of the king.

SETENE,

SETENE, or SEATON.——County of KENT.

Bertram de Criol held the manor of Sétene in the county of Kent, of the king by ſerjeanty, viz. to provide one man called *Veltrarius*, a *Vautrer*, to lead three *greyhounds* when the king ſhould go into Gaſcogny, ſo long as a *pair of ſhoes of four pence price* ſhould laſt.

BOYTON.——County of ESSEX.

William de Reynes formerly held two carucates[a] of land in Boyton in the pariſh of Finchingfend (Finchingfield) in the county of Eſſex, by the ſerjeanty of keeping for the king five *wolf dogs*. And the dean and chapter of London now hold that land.

CONINGSTON.——County of LEICESTER.

Thomas Winchard held land in Coningſton in the county of Leiceſter, in *capite*, by the ſervice of ſaying daily *five Pater Noſters* and *five Ave Marias*, for the ſouls of the king's progenitors, and the ſouls of all the faithful departed, for all ſervices.

SOCKBURN.——County of DURHAM.

In the eighth year of the pontificate of Walter Shirlawe, biſhop of Durham, 1395, Sir John Conyers, knight, died ſeiſed in his demeſne, as of fee tail, to him and the heirs male of his body iſſuing, of the manor of Sockburn, with the appurtenances; which ſame manor was held of the lord biſhop in *capite*, by the ſervice of ſhewing to the lord biſhop one *fawchon (falchion)* which after having been ſeen by the biſhop was to be reſtored to him, in lieu of all other ſervices.

This valuable manor of Sockburn (the ſeat of the antient family of Conyers, in the biſhoprick of Durham) worth 554l. a year, was in the year 1771 the eſtate of Sir Edward Blackett, and is held of the biſhop of Durham by the eaſy ſervice of preſenting a *falchion* to every biſhop, upon his firſt entrance into his dioceſe, as an emblem of his temporal power.

The manor of Sockburne was purchaſed by the late Sir William Blackett, baronet, of the grand-daughter of the laſt of the family of Conyers of Sockburne, whoſe mother was married into the family of the earl of Shrewſbury. The family

[a] Carucate, or a plough land, was formerly ſuch a quantity of land as might be tilled in a year and a day by one plough, but by Stat. 7, 8. W. III. c. 29. ſec. 5. it is land-houſes, &c. to the value of 50l. per annum.

family of Conyers were barons of the palatinate, and lords of Sockburne from the conqueſt, and before, till the inheritance was ſo carried, within a century paſt, by the marriage of the heireſs, into the family of the earl of Shrewſbury, as above-mentioned; and by her daughter was ſold amongſt other eſtates to Sir William Blackett.

Sir Edward Blackett now repreſents the perſon of Sir John Conyers, who, as tradition ſays, in the fields of Sockburne, ſlew, with this *falchion*, a monſtrous creature, a dragon, a worm, or flying ſerpent that devoured men, women, and children. The then owner of Sockburne, as a reward for his bravery, gave him the manor, with its appurtenances, to hold for ever, on condition that he meets the lord biſhop of Durham, with this *falchion*, on his firſt entrance into his dioceſe, after his election to that See.

And in confirmation of this tradition, there is painted in a window of Sockburne Church, the *falchion* we juſt now ſpoke of; and it is alſo cut in marble, upon the tomb of the great anceſtor of the Conyers's, together with a dog, and the monſtrous worm, or ſerpent, lying at his feet, of his own killing, of which the hiſtory of the family gives the above account.

When the biſhop firſt comes into his dioceſe, he croſſes the river Tees, either at the ford at Neſham, or Croft-Bridge: (where the counties of York and Durham divide) at one of which places, Sir Edward Blackett, either in perſon, or by his repreſentative, if the biſhop comes by Neſham, rides into the middle of the river Tees, with the antient *falchion* drawn in his hand, or upon the middle of Croft-Bridge; and then preſents the *falchion* to the biſhop, addreſſing him in the antient form of words. Upon which the biſhop takes the *falchion* into his hands, looks at it, and returns it back again, wiſhing the lord of the manor his health, and the enjoyment of his eſtate.

BISHOP'S-AUKLAND.——County of DURHAM.

In the 12th year of the pontificate of biſhop Shirlawe, 1399, Dioniſia, widow of John Pollard the elder, died ſeiſed of one piece of land, called Hekes, near the park of Aukland, which was held of the lord biſhop in *capite*, by the ſervice of ſhewing to the biſhop one *fawchon*, at his firſt coming to Aukland after his conſecration.

Theſe lands, now called Pollard's Lands, at Biſhop's Aukland, worth above 200l a year, continued to be held by the ſame ſervice. Doctor Johnſon of Newcaſtle, met the preſent biſhop, Doctor Egerton, in September 1771, at his

firſt arrival there, and preſented a *falchion* upon his knee, and addreſſed him in the old form of words, ſaying,

" My Lord! in behalf of myſelf, as well as of the ſeveral " other tenants of Pollard's lands, I do humbly preſent " your lordſhip with this *falchion*, at your firſt coming " here, wherewith, as the tradition goeth, Pollard ſlew " of old a great and venomous ſerpent, which did much " harm to man and beaſt: and by the performance of " this ſervice, theſe lands are holden."

N. B. This tenure, and that at Sockburne above-mentioned, are the only two performed at this day in the county.

WICHNOR.——County of STAFFORD.

Sir Phillip de Somervile, knight, held the manor of Wichnour in com. Stafford, of the Eirle of Lancaſter, then lord of the honour of Tutbury, by theſe memorable ſervices, viz. by two ſmall fees, that is to ſay, when other tenants pay for releef (of) one whole knight's fee, one hundred ſhillings; he the ſaid Sir Philip ſhall pay but fifty ſhillings, and when eſcuage[a] is aſſeſſed throughout the land, or ayde for to make the eldeſt ſon of the lord knyght, or for to marry the eldeſt daughter of the lord, the ſayd Sir Philip ſhal pay bot the moty of it, that other ſhal paye. Nevertheleſs the ſayd Sir Philip ſhal fynde meynteinge, and ſuſteinge one *bacon flyke*, hanginge in his halle at Wichenore, ready arrayed all tymes of the yere, bott in Lent, to be given to everyche mane or womane married after the day and yere of their mariage be paſſed; and to be given to everyche mane of religion, arch biſhop, prior, or other religious, and to everyche preeſt, after the year and day of their profeſſion finiſhed, or of their dignity reſeyved, in forme following, whenſoever that ony ſuch before named wylle come for to enquire for the baconne in there owne perſon, or by any other for them, they ſhall come to the bayliff or to the porter of the lordſhip of Whichenour, and ſhall ſay to them, in the manere as enſewethe.

" Baylife or porter I doo you to knowe, that I am come " for myſelf, (or if he come for any other ſhewing for " whome) to demand one *bacon flyke*, hanging in the halle " of the lord of Whichenour, after the forme thereunto " belonginge."

After which relation, the bailiff or porter ſhal aſſigne a day to him, upon promiſe by his feythe to returne, and with him

[a] A pecuniary ſatisfaction, inſtead of perſonal military ſervice.

him to bring tweyne of his neighbours, and in the meyn time the ſaid bailif ſhal take with him tweyne of the freeholders of the lordſhip of Whichenoure, and they three ſhal goe to the mannour of Rudlowe, belonging to Robert Knyghtleye, and there ſhal ſomon the foreſaid Knyghtley or his bayliffe, commanding hym to be ready at Whichenour the day appointed at pryme of the day, with his carriage, that is to ſay, a *horſe* and a *ſadyle*, a *ſakke* and a *pryke*, (i. e. ſpur) for to convey and carry the ſaid baconne and corne a journey owt of the countee of Stafford at his coſtages; and then the ſayd bailiffe ſhal, with the ſaid freeholders ſomon all the tenaunts of the ſaid manoir to be ready at the day appoynted at Whichenour, for to doe and performe the ſervices which they owe to the *baconne;* and at the day aſſigned, all ſuch as owe ſervices to the baconne ſhal be ready at the gatte of the manoir of Whichenour, frome the ſonne riſinge to none, attendyng and awayting for the comyng of hym that ſetcheth the baconne; and when he is comyn, there ſhal be delivered to hym and his fellowys chapeletts, and to all thoſe whiche ſhal be there, to doe their ſervices deue to the baconne; and they ſhal lede the ſeid demandant wythe tromps and tabours and other manner of mynſtralſcye to the hall dore, where he ſhal fynde the lord of Whichenour or his ſteward redy to deliver the baconne in this manere.

He ſhall enquere of hym which demandeth the bacone, if he have brought tweyne of his neighbours with him, which muſt anſwere, "*they be here ready:*" and then the ſteward ſhall cauſe theis two neighbours to ſwere, yf the ſeid demandant be a weddyt man, or have be a man weddyt; and, yf ſyth his marryage one yere and a day be paſſed: and if he be a freeman or villeyn. And if his ſaid neighbours make othe that he hath for hym all theis three poynts reherſed, then ſhall the baconne be take downe and broght to the halle dore, and ſhal there be layd upon one half a quarter of wheatte and upon one other of rye. And he that demandeth the baconne ſhal kneel upon his knee, and ſhall hold his right hande upon a booke, which booke ſhall be layd above the baconne and the corne, and ſhal make oath in this manere.

"Here ye, Sir Philip de Somervyle, lord of Whichenour,
"mayntayner and giver of this baconne, that I A. ſyth
"I wedded B. my wife, and ſyth I had her in my kep-
"yng and at my wylle, by a yere and a daye after our
"marryage, I wold not have chaunged for none other,
"farer

" farer ne fowler richer ne powrer, ne for none other de-
" ſcended of gretter lynage, ſlepyng ne waking, at noo
" tyme. And if the ſaid B. were ſole and I ſole, I
" wolde take her to be my wife before all the wymen
" of the worlde, of what condytions ſoever they be,
" good or evyle, as helpe me God and his ſeyntys, and
" this fleſh, and all fleſhes."

And his neighbours ſhall make oath that they truſt verily he hath ſaid truly: and yf it be founde by his neighbours before-named, that he be a freeman, there ſhall be delyvered to him half a quarter of *wheatte* and a *cheeſe*: and yf he be a villein, he ſhall have half a quarter of *rye* withoutte cheeſe, and then ſhal Knyghtley, the lord of Rudlowe, be called for to carry all theis thynges to fore reherſed: and the ſaid corne ſhal be layd upon one horſe, and the baconne above yt, and he to whom the baconne apperteigneth ſhal aſcend upon his horſe, and ſhall take the *cheeſe* before hym, if he have a horſe, and yf he have none, the lord of Whichenour ſhall cauſe him to have one horſe and ſadyl, to ſuch tyme as he be paſſed his lordſhippe; and ſoe ſhall they departe the manoyr of Whichenour with the corne and the baconne to fore him that hath wonne ytt with trompets, tabourets, and other manoir of mynſtralce. And all the free tenants of Whichenour ſhal conduct him to be paſſed the lordſhip of Whichenour, and then ſhall all they retorne, except hym to whom apperteigneth to make the carriage and journey withoutt the countye of Stafford, at the coſtys of his lord of Whichenour.

And yf the ſeid Robert Knyghtley doe not cauſe the baconne and corne to be conveyed as is reherſed, the lord of Whichenour ſhal do it to be carried, and ſhall diſtreigne the ſaid Robert Knyghtley for his default, for one hundred ſhillings in his manoir of Rudlow, and ſhale kepe the diſtreſſe ſo takyn, irrepleviſable[a].

STAMFORD.—County of LINCOLN.

William, earl Warren, lord of this town in the time of king John, ſtanding upon the caſtle walls, ſaw two bulls fighting for a cow in the Caſtle Meadow, till all the butchers dogs purſued one of the bulls (madded with noiſe and multitude) clean through the town. This ſight ſo pleaſed the earl, that he gave the Caſtle Meadows, where the bulls duel began, for a common to the butchers of the town, after the firſt graſs was mowed, on condition that they ſhould find

[a] This was a tranſlation in the time of Henry VII. of a roll in French in the time of Edw. III.

find a *mad bull*, the day ſix weeks before *chriſtmas day*, for the continuance of that ſport for ever.

It is very obſervable, that here they have the cuſtom, which Littleton, the famous common-lawyer, calls Borough-Engliſh, i. e. the younger ſons inherit what lands or tenements their fathers die poſſeſſed of, within this manor.

BROOKHOUSE.——County of YORK.

A farm at Brook-Houſe in Langſett, in the pariſh of Peniſton, and county of York, pays yearly to Godfrey Boſville, Eſquire, a *ſnow-ball* at Midſummer, and a *red roſe* at Chriſtmas.

This is certainly a moſt extraordinary tenure, and yet the editor has no doubt but it is very poſſible to perform the ſervice: he has himſelf ſeen *ſnow* in caverns or hollows, upon the high moors, in this neighbourhood, in the month of June; and as to the *red roſe* at Chriſtmas (as he does not ſuppoſe that it was meant to have been growing juſt before it was preſented) he thinks it is not difficult to preſerve one till that time of the year.—As the things tendered in tenures were uſually ſuch as could eaſily be procured, and not impoſſible ones, we muſt ſuppoſe that the two here mentioned were redeemable by a pecuniary payment to be fixed at the will of the lord.

WORTHYNBURY.——County of FLINT.

Richard de Pyneleſdon (Puleſdon) holds lands and tenements in Worthynbury, in the parts of Mailer Says-nec, in the county of Flint, which are held of our lord the king by certain ſervices, and by *ammobragium*[a], which extended to five ſhillings, when it happened.

EAST

[a] *Ammobragium.* A pecuniary acknowledgment paid by the tenants to the king, or vaſſals to their lord, for liberty of marrying or not marrying. Thus Gilbert de Maiſnil gave ten marks of ſilver to Henry III. for leave to take a wife, and Cecily, widow of Hugh Pevere, that ſhe might marry whom ſhe pleaſed. It is ſtrange that this ſervile cuſtom ſhould be retained ſo long. It is pretended that the *amobyr* among the Welſh, the *lyre-wite* among the Saxons, and the *marcheta mulierum* among the Scots, were fines paid by the vaſſal to the ſuperior, to buy off his right to the *firſt night's lodging* with the *bride* of the perſon who held from him: but I believe there never was any European nation (in the periods this cuſtom is pretended to exiſt) ſo barbarous as to admit it. It is true that the power above cited was introduced into England by the Normans out of their own country. The *amobyr*, or rather *gobr merch*, was a Britiſh cuſtom of great antiquity, paid either for violating the chaſtity of a virgin, or for the marriage of a vaſſal, and ſignifies the price of a virgin. The Welch

EAST and WEST ENBORNE.——County of BERKS.

The manors of Eaſt and Weſt Enborne, in the county of Berks, have this cuſtom; that if a copyhold tenant die, the widow ſhall have her *free-bench* [b] in all his copyhold lands, whilſt ſhe continues ſole and chaſte *(dum ſola et caſta fuerit)*; but if ſhe commits incontinency, ſhe forfeits her widow's eſtate; yet, after this, if ſhe comes into the next court held for the manor, *riding backward* upon a *black ram*, with his *tail* in

Welch laws, ſo far from encouraging adultery, checked by ſevere fines, even unbecoming liberties. The *amobyr* was intended as a preſervative againſt lewdneſs. If a virgin was deflowered, the ſeducer, or, in his ſtead, her father, paid the fine. There is one ſpecies ſo ſingular as to merit mention: If a wife proved unfaithful to her huſband's bed, the poor cuckold was obliged to pay his ſuperior five ſhillings as long as he did *cydgyſgu*, i. e. ſleep with her: but if he forbore cohabiting with her, and ſhe *cydgyſgu'd* with her gallant, the fine fell on the offending fair. To cuckold the prince was expiated at a very high rate; the offender was fined in a *gold cup* and *cover* as broad as his majeſty's face, and as thick as a ploughman's nail who had ploughed nine years, and a *rod of gold* as tall as the king, and as thick as his little finger; a hundred *cows* for every *Cantred* [c] he ruled over, with a *white bull* with different coloured ears to every hundred *cows*.

The recompence to a virgin, who had been ~~ſeduced~~ deflowered of her own accord, is very ſingular: on complaint made that ſhe was deſerted by her lover, it was ordered by the court, that ſhe was to lay hold of the *tail* of a *bull* of three years old, introduced through a wicker-door, and ſhaven and well greaſed. Two men were to goad the beaſt: if ſhe could, by dint of ſtrength, retain the bull, ſhe was to have it by way of ſatisfaction; if not, ſhe got nothing but the greaſe that remained in her hands.

See Laws & Customs of Wales.

It is ſingular, that the antient Britons ſhould make ſo light of the crime intended, when one nation of our *Celtic* anceſtors, the Germans, (but quære whether the Germans were *Celtæ*) inflicted the moſt cruel puniſhment on the female offender at leaſt.

The Saxons had their *lyre-wyte*, or *lecher-wyte*, for the ſame end that the Welſh had their *amobyr*. The crime is mentioned often in the Saxon laws: once with a cruel penalty denounced againſt the offender; and a ſecond time, with a ſtrong dehortation from the commiſſion.

In general the crime was expiated with money, according to the degree of the perſon injured. The Indians at this time commute in certain degrees of offence; but oftener puniſh it with *burning*, and other excruciating deaths.

[b] *Free-Bench (Franc-Bank, Francus*, i. e. *Sedes libera)*, is that eſtate in copyhold lands, which the wife, being eſpouſed a virgin, hath after the death of her huſband for her dower, according to the cuſtom of the manor, &c.

[c] From *centum*, and *tret*, a town or village, an hundred villages: the Welch divide their countries into cantreds, as the Engliſh do into hundreds.

in her *hand*, and ſays the words following, the ſteward is bound by the cuſtom to re-admit her to her *free-bench*.

" Here I am,
" Riding upon a black ram,
" Like a Whore as I am;
" And for my Crincum Crancum,
" Have loſt my Bincum Bancum;
" And for my Tail's Game,
" Am brought to this worldly ſhame,
" Therefore good Mr. Steward let me have my
" Lands again[a]."

BERK-HOLT.——County of SUFFOLK.

The men of Berk-holt, in the county of Suffolk, ſay, that in the time of king Henry, grandfather of our lord the preſent king (Henry III.) they uſed to have this cuſtom; that when they would marry their daughters, they uſed to give to the lord for licence ſo to do, two *ores*[b], which were worth thirty-two pence. *Beckwith's* edition of *Blount's Fragmenta Antiquitatis.*

FORCIBLE

[a] This is the ſubject of an amuſing number in the Spectator.

[b] *Oras.* Here theſe *ores* (which were Saxon coins) are declared to be in value of our money, ſixteen pence a-piece; but after, by the variation of the ſtandard, they valued twenty pence a-piece. And this fine for the tenants marrying their daughters *(pro filiabus ſuis maritandis)* was, without doubt, in lieu of the *marcheta mulierum*, or firſt night's lodging with the bride, which the lord antiently claimed in ſome manors.

The term *marcheta*, which has given occaſion to that fiction of folly in the beſt hiſtories of Scotland, that the lord had a privilege to ſleep with the bride of his vaſſal, on her wedding night; which has been explained by derivations equally obſcene and ſtupid, is apparently nothing more than the *Merch-ed* of *Howel-Dha*, the *Daughter-hood*, or the fine for the marriage of a daughter. Whitaker's Hiſt. of Mancheſter, Lib. i. Cap. 8. Sect. 3. Page 265.

On this ſubject, Blackſtone in his Commentaries, 2 vol. p. 83, ſpeaks as follows. To lands called Borough Engliſh the youngeſt ſon, and not the eldeſt ſucceeds as heir to the father. For which Littleton gives this reaſon, becauſe the younger ſon, by reaſon of his tender age, is not ſo capable as the reſt of his brethren to help himſelf. Other authors, have indeed given a much ſtranger reaſon for this cuſtom, as if the lord of the fee had antiently a right of concubinage with his tenants wife on her wedding night; and that therefore the tenement deſcended not to the eldeſt, but the youngeſt ſon; who was more certainly the offspring of the tenant. But I cannot learn that ever this cuſtom prevailed in England, though it certainly did in Scotland (under the name of *mercheta*, or *marcheta*) till abolished by Malcom III.

FORCIBLE MARRIAGE.

ONE offence relating to the female part of his majeſty's ſubjects, is that of their *forcible abduction* and *marriage*; which is vulgarly called *ſtealing an heireſs*. For by ſtatute 3 Hen. VII. c. 2. it is enacted, that if any perſon ſhall for lucre take any woman, being maid, widow or wife, and having ſubſtance either in goods or lands, or being heir apparent to her anceſtors, contrary to her will; and afterwards ſhe be married to ſuch miſdoer, or by his conſent to another, or defiled; ſuch perſon, his procurers and abettors, and ſuch as knowingly receive ſuch woman, ſhall be deemed principal felons; and by ſtatute 39 Eliz. c. 9. the benefit of clergy[a] is taken away from all ſuch felons, who ſhall be principals, procurers, or acceſſaries *before* the fact.

In the conſtruction of this ſtatute it hath been determined, 1. That the indictment muſt alledge that the taking was for lucre, for ſuch are the words of the ſtatute. 2. In order to ſhew this, it muſt appear that the woman has ſubſtance either real or perſonal, or is an heir apparent. 3. It muſt appear that ſhe was afterwards married or defiled. And though poſſibly the marriage or defilement might be by her ſubſequent conſent, being won thereunto by flatteries after the taking, yet this is felony, if the firſt taking were againſt her will: and ſo *vice verſa*, if the woman be originally taken away with her own conſent, yet if ſhe afterwards refuſe to continue with the offender, and be forced againſt her will, ſhe may from that time, as properly be ſaid to be takn againſt her will, as if ſhe never had given any conſent at all; for, till the force was put upon her, ſhe was in her own power. It is held that a woman, thus taken away and married, may be ſworn and give evidence againſt the offender, though he is her huſband *de facto*, contrary to the general rule of law; becauſe he is no huſband *de jure*, in caſe the actual marriage was alſo againſt her will. In caſes, indeed, where the actual marriage is good, by the conſent of the inveigled woman obtained after her forcible abduction, Sir Matthew Hale ſeems to queſtion how far her evidence ſhould be allowed; but other authorities ſeem to agree, that it ſhould even then be admitted

[a] For the Hiſtory of this phraſe ſee 4 Blackſtone's Commentaries, p. 365, its acceptation now is that the offender from whom it is taken, ſhall be condemned and ſuffer death.

ted, eſteeming it abſurd, that the offender ſhould thus take advantage of his own wrong, and that the very act of marriage, which is a principal ingredient of his crime, ſhould (by a forced conſtruction of law) be made uſe of to ſtop the mouth of the moſt material witneſs againſt him. 4 Black. Comm. 208.

On the abovementioned ſtatute 3 Hen. VII. c. 2. *Haagen Swendſen*, *Sarah Baynton*, *John Hartwell*, and *John Spurr*, were indicted for a forcible marriage of *Swendſen* to *Pleaſant Rawlins*. A. D. 1702.

The indictment charged, That Mrs. *Pleaſant Rawlins*, being a virgin, and grandaughter and heir of *William Rawlins*, ſenior, deceaſed, and daughter and heir of *William Rawlins*,, junior, deceaſed; and being above the age of ſixteen years, and under the age of eighteen; and having an eſtate in moveables, and in lands and tenements, viz. in money, goods, and chattels, to the value of 2000l. and lands and tenements of the value of 20l. per annum, to the heirs of her body; the priſoners *Haagen Swendſen*, &c. (together with one *Thomas Holt*) did, on the 6th day of November, 1702, at the pariſh of St. Giles's in the fields, in the county of Middleſex, for the lucre of the eſtate and ſubſtance of the ſaid *Pleaſant Rawlins*, unlawfully, felonioufly, and violently, and againſt the will of the ſaid *Pleaſant Rawlins*, take and carry her away, with an intent to marry her to the ſaid *Haagen Swendſen*; who being a man of a diſhoneſt converſation, and of none, or a very little eſtate or ſubſtance, did then, and there, by the help and procurement of the ſaid other priſoners, felonioufly marry the ſaid *Pleaſant Rawlins*, and carnally know her: and that the ſaid *Thomas Holt*, the day and year aforeſaid, did knowingly and felonioufly receive the ſaid *Pleaſant Rawlins* and *Haagen Swendſen*, and did incite, aid, and abet the ſaid *Haagen Swendſen* to lie with the ſaid *Pleaſant Rawlins*, and carnally know her, to the diſpleaſure of Almighty God, the diſparagement of the ſaid *Pleaſant Rawlins*, the grief of her friends, againſt the queen's peace, &c.

Swendſen being a foreigner, a jury was ſworn, one half whereof were foreigners [a].

Mr. Solicitor-General opened the evidence, and ſaid, That it was formerly reckoned a leſs crime to ſteal a fortune of

[a] In criminal proſecutions where the party is a foreigner, he is entitled to a Jury, one half foreigners; a privilege, ſays Blackſtone, indulged to ſtrangers in no other country in the world.

of ten thouſand pounds, than to ſteal the value of a ſhilling of her money or goods; but, in the third year of *Henry VII.* to cure this defect in the law, a ſtatute was made, whereby the taking away a woman, having lands or goods, or being an heir apparent, contrary to her will, and afterwards marrying her, was made felony; and upon this law the preſent indictment is grounded.

Pleaſant Rawlins was the daughter of Mr. *William Rawlins*, who having left her a conſiderable eſtate, appointed *George Bright* and *William Buſby* her guardians. Mr. *Bright* being dead, the other guardian, Mr. *Buſby*, for the better education of Mrs. *Rawlins*, placed her under the care of his ſiſter, *Sabina Buſby:* Mrs. *Buſby* and Mrs. *Rawlins* have lodged, about three years laſt paſt, at the houſe of the *Widow Nightingale*. *Haagen Swendſon*, with Mrs. *Baynton*, lodged at Mrs. *Blake*'s in *Holborn*, and there they firſt projected and contrived how they might make a prey of this young gentlewoman. The firſt ſtep they took towards executing this deſign, was, to get lodgings at Mrs. *Nightingale*'s houſe for Mrs. *Baynton;* for which purpoſe ſhe was to paſs for a country gentlewoman, of a plentiful fortune: one Mrs. *St. John* was ſent to Mrs. *Nightingale* to take lodgings for Mrs. *Baynton*; commending her to be a very good woman, and that having the misfortune of a law-ſuit, and being obliged for that reaſon to attend it in town, 'twas her greateſt care to lodge in ſo reputable a houſe as Mrs. *Nightingale*'s was: under this pretence lodgings were there taken for her. At her firſt coming, ſhe was forced to put on a diſguiſe; ſhe ſeemed to live a virtuous life, that ſhe might ingratiate herſelf into the favour of the family, as often as ſhe had an opportunity of converſing with any of them: ſhe pretended ſhe had a brother of a good eſtate, one of the beſt men in the world; and ſhe hoped he would ſhortly come to town, that ſhe might ſee him. In a little time after came this *Swendſon* (being nothing related to her), and appeared as her brother, and frequently viſited her under pretence of that relation. But Mrs. *Baynton* was too well known in town to continue long undiſcovered: notice was ſoon given to Mrs. *Buſby*, of the vicious life Mrs. *Baynton* had led, and that ſhe was not fit to be in the ſame houſe with her. Mrs. *Baynton* having diſcovered this, and finding ſhe had no time to bring about her deſigns by frauds and wiles, and that no other way was left but open force, the priſoner at the bar and ſhe took meaſures accordingly; and, in order thereto, 'twas agreed, that a writ ſhould be taken out againſt Mrs. *Rawlins*: Mrs. *Baynton* contrives to get Mrs. *Rawlins* and Mrs. *Buſby* into a coach,

and, at a place appointed, a ſignal was given, and the writ executed: and Mrs. *Buſby*, Mrs. *Rawlins*, and Mrs. *Baynton* were all carried in a coach to the *Star and Garter* tavern in *Drury-Lane*, where particular care was taken to ſeparate Mrs. *Buſby*, and Mrs. *Rawlins*, becauſe, unleſs they did that, they could not hope to accompliſh their deſigns: Mrs. *Buſby* was by force kept at that tavern, without any proceſs againſt her, till the marriage was over; but Mrs. *Rawlins* was forcibly carried to *Hartwell*'s, the bailiff's, houſe. Mrs. *Baynton* pretended to be much concerned for Mrs. *Rawlins*, and went in all haſte to call ſome of her friends to be bail for her. Some time after Mrs. *Rawlins* had got to *Hartwell*'s, in comes Mrs. *Baynton*, pretending that, by mere accident, ſhe had diſcovered her being there, hearing her name as ſhe was paſſing by the door; that ſhe had been in ſearch, but could find no help, that her laſt hopes was her dear brother *Swendſen*, and ſhe doubted not but he would bail her. He, by agreement, had been placed near the bailiffs, and ſo was ſoon found, and brought thither, and was very ready to aſſiſt her. In order to her diſcharge, the priſoner, the bailiff, and Mrs. *Baynton*, carry Mrs. *Rawlins*, to another tavern, where they had a parſon ready for their purpoſe; and there this young gentlewoman, through divers artifices, was conſtrained to marry him.

The evidence for the crown being called, Mr. *William Buſby*, guardian to Mrs. *Rawlins*, was ſworn, and teſtified, That ſhe was the daughter of *William Rawlins*, deceaſed; who left his eſtate to *Dr. Bright* and this witneſs, to be ſold for the payment of his debts and legacies, and gave the ſurpluſage to his daughter, which amounted to about 2000l. and ſhe had alſo an eſtate in lands, of the value of 20l. a year; and that ſhe was at this time near eighteen years of age, and unmarried.

Mrs. *Nightingale* depoſed, That Mrs. *Pleaſant Rawlins*, and Mrs. *Buſby*, had lodged at her houſe three years; and that Mrs. *St. John* came to inquire for lodgings at her houſe, for a country lady, (which afterwards proved to be Mrs. *Baynton*, the priſoner): that ſhe (the witneſs) enquired of her character, and was informed, Mrs. *Baynton* was of a very good family; whereupon ſhe conſented ſhe ſhould come and board at her houſe, with her maid, who happened to be a neighbour's daughter: that Mrs. *Baynton* afterwards introduced Mr. *Swendſen*, as her brother; and deſired he might dine at her houſe, which ſhe agreed he ſhould, at the rate of twelve-pence a meal: but it was not long before they perceived an extraordinary familiarity between Mrs. *Baynton* and

and Mr. *Swendſen*, more than was uſual between brother and ſiſter, and ſhe gave notice of it to the family, deſigning to have given Mrs. *Baynton* warning; but ſhe prevented her, by ſaying, her affairs permitted her going into the country, and ſhe deſigned to return thither when her month was up: ſhe did not go, however, pretending a fellow was come to town, that intended to put a cheat upon her, and ſhe muſt ſtay a week longer, to take out a ſtatute againſt him.

Mrs. *Buſby* teſtified, That her brother *Buſby*, being one of Mrs. *Rawlins*'s guardians, put her under the care of her huſband; and Mrs. *Nightingale* agreed, that he might dine there at twelve pence a meal, and he dined there accordingly nine or ten times; but at length, obſerving an extraordinary familiarity between Mrs. *Baynton* and *Swendſen*, they began to ſuſpect her virtue.——That Mrs. *Baynton* knowing it was their cuſtom to go to *Oxenden* chapel every Friday morning, ſaid, ſhe was going to *Golden-ſquare*, and would take them in her coach, and ſet them down near the chapel; and accordingly they accepted of her offer, and went with her in the coach; but being come to *Dartmouth-ſtreet*, they heard ſome body bid the coach ſtop; and immediately *Hartwell*, the bailiff, crouded into the coach, and laying hold of Mrs. *Rawlins*, ſaid, his concern was with that lady and the witneſs, and carried them all to the *Star and Garter* tavern in *Drury-lane*: that ſhe intreated him to carry them to *Fleet-Street*, where ſhe had friends; but he was angry, and would not hear of it; and Mrs. *Baynton* left them, and pretended ſhe would go ſee for her friends: Whereupon ſhe and Mrs. *Rawlins* were in a great conſternation; and ſhe (the witneſs) took Mrs. *Rawlins* by the arm, and ſaid, She would live and die with her; but the bailiffs forced them aſunder, and carried her (the witneſs) to another room; and as ſhe was going, ſhe put her head out of a window, and cried, Murder; which brought ſome of the neighbours in; but the bailiffs telling them, it was an arreſt, they would not meddle in it; however, a little boy offering to go of an errand for her, ſhe ſent for two gentlemen; who came to her; and after a little time, the bailiffs left her (the witneſs) with the gentlemen, without taking any bail; and ſhe never ſaw Mrs. *Rawlins* again, till the next day at noon.

Mr. *Berkley* teſtified, That ſhe demanding of Mr. *Swendſen*, when he was apprehended, If that wicked woman, Mrs. *Baynton*, was his ſiſter? He anſwered, No: but he had gained his end, in making her a tool to his dear wife: He would gratify her for what ſhe had done, and put her away on Monday, and ſee her no more.

Blake depoſed, That Mr. *Swendſen* and Mrs. *Baynton* lodged at his houſe in *Red-lion-ſtreet*, ſix or ſeven months: that he had known Mrs. *Baynton* theſe twelve years; ſhe was no country lady, but worked for her living, and went from his houſe five or ſix weeks before this matter happened, and he never ſaw any harm by her.

Wakeman, the bailiff's follower, being ſworn, teſtified, That *Hartwell* took him and *Spurr* to *Stretten-grounds*, where they ſtopped a coach, and *Hartwell* went into the coach, and arreſted the lady; and then they drove to the *Star and Garter* in *Drury-lane*, and from thence ſhe was carried to *Hartwell*'s houſe: that one Mr. *Holt* took this witneſs from *Hartwell*'s houſe to the Five Bells in *Witch-ſtreet*, where he ſaw Mr. *Swendſen*, the priſoner; and *Holt* made him drink, and enquired after the lady they had arreſted: that returning to *Hartwell*'s houſe again, he was told, the lady was carried to the *Vine* tavern in *Holborn*, whither he went, and ſaw Mr. *Swendſen* there; and the lady was looking out of a window over-againſt the tavern; he did not ſee her at that tavern: and, it being demanded, if they had any proceſs againſt Mrs. *Buſby* he anſwered, None at all.

Then Mrs. *Pleaſant Rawlins* was ſworn, and gave the following evidence.

I was in a coach, going to *Oxenden* chapel with Mrs. *Buſby* and Mrs. *Baynton*, and three bailiffs came about the coach, and carried us to the *Star and Garter* tavern in *Drury-lane;* they forced me up ſtairs into a back room, but we got into a forward room; we had not been there long, before they parted Mrs. *Buſby* and me: Mrs. *Baynton* was gone for our friends, as ſhe pretended. I was in a very great fright; and Mrs. *Buſby* ſaying, We will die together, they took me by force from her; *Hartwell* ſwore a great oath, and thruſt me down ſtairs, and forced me out of a back door into an alley. When he went to put me into a coach, I cried out, Murder! then he threatened to put me into *Newgate*. He carried me to his own houſe, where Mrs. *Baynton* came in, pretending, ſhe heard my name as ſhe was going by; ſhe ſaid, ſhe would ſend for her brother, who ſhould bail me. He came, and we went to the *Vine* tavern in *Holborn*, where I was an hour or two before I heard any thing of marrying; but after we had dined, ſhe begged of me to have her brother; and ſaid, if I did not marry him, I ſhould be ruined: I deſired my friends might be ſent for; but they would not admit of it. She aſked me to let her ſee the ring off my finger; which I refuſing, ſhe forced it from me, and ſaid, ſhe would go and get a wedding ring made by it. When they

they brought the ring, they ſaid to me, Will you be married or no? I ſaid, I would not, without the conſent of my friends: they ſaid, if I did not, I ſhould be ruined for ever; and they brought a parſon and a clerk up ſtairs: the parſon ſaying, I hear there is a couple to be married, aſked no queſtions, but told me, if I did not marry this gentleman, I ſhould be ſent to Newgate: ſo, with many threats and perſuaſions, they at laſt prevailed with me to marry; I was forced to marry him out of fear, not of going to *Newgate*, but of being murdered. It was about three in the afternoon, when I was married, and about candle-light, they carried me to *Blake*'s houſe, in *Red-lion-fields:* they thruſt me up ſtairs, and ordered to have a bed ſheeted. Mrs. *Baynton* bid me undreſs, and go to bed: I ſaid, I would not: then ſhe ſaid, ſhe would pluck the clothes off my back; and, at length, ſhe forced me to go to bed: It was Saturday morning before I was releaſed; then ſome of my friends came to the place where I was.

The Lord Chief Juſtice demanding of *Swendſen*, what anſwer he gave to this evidence? He ſaid, He was very much unprepared, having had ſo little time allowed him: the court anſwered, he had been told, If he could have ſhewn any cauſe, his trial ſhould have been put off: then he begged very importunately, that his wife (Mrs. *Rawlins*) might ſtand by herſelf; intimating, ſhe would be prompted what to ſay by the company about her: the counſel anſwered, He did this on purpoſe to frighten her; however, the court at length conſented ſhe ſhould remove to another place; after which, *Swendſen* ſaid, The firſt time he was at Mrs. *Nightingale*'s, he was deſired by Mrs. *Buſby* and Mrs. *Baynton* to make a bowl of punch; which he did, and they were very merry over it: then he invited them to go on board a ſhip; which they all did, and, in a ſhort time, became very well acquainted, inſomuch, that they invited him the week following to partake of a treat; accordingly he went, and met one Mr. *Pugh* there, who, at that time, courted Mrs. *Rawlins;* but the little time he (the priſoner) was acquainted with her, he diſcerned ſhe had a kindneſs for him, as he had for her: that he thereupon told her, He could not be eaſy while ſhe ſuffered *Pugh* to kiſs her; ſhe bid him be eaſy, and ſaid, It ſhould be remedied.

Here Mrs. *Rawlins* denied ſhe ever ſaid any ſuch words: then *Swendſen* demanded, If ſhe did not ſay, ſhe would not eat a bit, if he did not ſit by her? This ſhe alſo denied; whereupon he demanded, If ſhe did not give him ſome encouragement? She anſwered, She knew of no ſuch thing.

Then

Then the Chief Juſtice told her, She ought to ſpeak the truth, becauſe his life depended on it; and aſked her, If ſhe ever did admit his courtſhip in order to marry him? She anſwered, She remembered no ſuch thing, ſhe did not know ſhe ſhewed him any more kindneſs than the reſt of the family did; nor was ever in his company alone.

Then the priſoner ſaid, That once after dinner, ſhe heaped peeled walnuts upon his plate, till the company took notice of it: that at other times ſhe kiſſed him, and ſqueezed him by the hand; and when he talked of marrying her, ſeemed very well pleaſed: but ſhe denied all this, and ſaid, She never was with him alone: And Mrs. *Buſby* declared, She ſaw nothing of all this. Then he called a picture-drawer, to give an account of ſome amorous converſation between them, when they came to his houſe to ſee Mrs. *Baynton*'s picture that was drawing; but the Painter could teſtify nothing of that nature; whereupon the Chief Juſtice told him, He was in a great deal of danger if he could produce no better witneſſes.

The Priſoner proteſted, He knew nothing of the arreſt, directly or indirectly, till he ſaw her in the Bailiff's houſe: and, that ſhe married him with as much freedom as a woman could.

Then the Chief Juſtice bid her give an account, how ſhe was carried from the Bailiff's houſe.

Mrs. *Rawlins* anſwered, When I was at *Hartwell*'s, the Bailiff's houſe, Mrs. *Baynton* pretended to come by accidentally, and that ſhe he heard my voice; and came in, and ſaid, How do you do, Mrs. *Rawlins?* You know how I do, ſaid I. She pretended to help me, and propoſed to go to her brother to bail me; and he came, and I was carried from thence in a coach to the *Vine*-Tavern, and *Swendſen* went in the coach with her.

The Priſoner then called the parſon that married them, for a witneſs, who depoſed, That a gentleman fetched him and his clerk from the *Fleet*, to the *Vine*-Tavern in *Holborn*; and being introduced to the priſoner, he aſked him, What he was to do? And he anſwered, To marry him to that young gentlewoman: that he read the licenſe, and found it a true licenſe; and aſking the lady her name, found it to be the ſame with that in the licenſe: then he aſked her, If ſhe was willing to be married? And ſhe ſaid, She was willing; and another gentlewoman was with her, that ſaid ſhe was her ſiſter: whereupon he ſaid, If you conſent, and your ſiſter is willing, here is a licenſe, and I believe there is no danger in marrying you. The Chief Juſtice demanded, If the

licenſe directed the marriage ſhould be performed in a tavern? And if he took the queen's duty? He anſwered, No; but he returned their names to the ſupervifors; he never married any in a tavern before, and would never do it again; and acknowledged, he ſtaid and dined with the new-married couple.

Then he called Mr. *Cotchet* and Mrs. *Cotchet*. of the *Vine*-tavern, as witneſſes; and being aſked by the Chief Juſtice, If they heard any noiſe, or ſaw any violence uſed to the young woman? They ſaid, They obſerved none: that they were ſhewn in a lower room when they came in, but choſe to go up ſtairs; and ſoon after Mr. *Holt*, the vintner, came down and went out; and that *Hartwell*, the bailiff, told them, it was an arreſt, and that the parſon was to be bail for the lady; but afterwards they ſaid, there was a wedding above, and they admired at it, that there ſhould be a wedding and bailiffs there: and after all was over, the gentleman and the lady went out at the back door, and took coach, and the lady did not ſeem diſcontented.

Sarah Walker, the Cook at the *Vine*, depoſed, That when the young gentlewoman came in, ſhe heard there was to be a wedding, and ſhe went up ſtairs to receive directions for the ſupper, and the young lady ſat at one end of the room, and ſeemed very melancholy: and when ſhe aſked her what ſauce ſhe would have, ſhe ſaid, She would eat nothing at all; but when ſhe went away, ſhe did not ſeem melancholy.

Blake, the man's daughter where ſhe was put to bed, depoſed, That they came to their houſe about three or four o'clock in the afternoon, and went to bed about two hours after, and roſe again at ſeven in the evening, and went away; and that ſhe helped to undreſs her when ſhe went to bed, the lady deſiring ſhe might wait on her; and that Mr. *Swendſen* told her, the young lady was his wife.

Blake himſelf being called as a witneſs, and aſked what he knew of Mrs. *Baynton*, anſwered, that he had known her twelve years, and it was reported ſhe was married to Mr. *Baynton*, who died about four years ſince; but confeſſed ſhe lay in at his houſe about four months ago. And being aſked, Why, when he knew ſhe was ſuch a woman, and brought a gentlewoman to his houſe, and ordered a bed to be made, he would admit of it? *Blake* anſwered, He did not know it was a clandeſtine thing.

The Conſtable, who apprehended *Swendſen*, teſtified, That he had a warrant to take up the men that ran away with the young gentlewoman, and he went with ſome gentlemen

tlemen to Mr. *Blake*'s houſe, in *Red-lion-ſtreet*, where he found Mr. *Swendſen* and the lady; and one of the gentlemen (her friend) aſked her, If ſhe was married? She anſwered, Yes, there is my huſband, and ſeemed very much ſatisfied: whereupon he wiſhed her joy, and ſaid, if ſhe pleaſed to go with him to the Recorder's, there was her guardian to approve what ſhe had done; but ſhe would go to the next Juſtice of peace.

Here the Priſoner obſerved, That ſhe ſaid to the Conſtable, I am very well content with the marriage, and this is the ring that married us. Mrs. *Rawlins* anſwered, She did not know but ſhe might ſay ſo, for ſhe was not in her ſenſes, and did not know what ſhe ſaid: and the court demanding, If ſhe had been in bed then? She anſwered, Yes, they had been in bed about an hour; that Mrs. *Baynton* threatened her, and ſaid, ſhe muſt own him for her huſband, or they were all ruined.

Then Juſtice *Baber* teſtified, That on Friday, the 6th inſtant, the priſoner, the lady, and another came to his houſe, in *York-Buildings*, and the priſoner in particular deſired he would adminiſter a voluntary oath to her, whether ſhe was married to him; but he did not think he had any thing to do to give ſuch an oath, and therefore did not tender it, and perceived ſhe was in great diſorder; that they came to him in a coach, and had then no officer with them: and that ſhe did ſay, voluntarily, She was married with her own conſent.

Bulkley, the priſoner's barber, depoſed, That he and the young lady called at his door, in *York-Buildings*, in a coach, on the 7th of November, and the priſoner told him he was married, and that was his wife; and he wiſhed them much joy and happineſs: ſhe anſwered, She did not queſtion it, ſince what ſhe had done was with her own voluntary conſent.

Hudſon, *Blake*'s man, teſtified, That Mr. *Swendſen* came with the lady to their houſe on Saturday morning; and Mr. *Swendſen* ſaid, That was his dear wife; and ſhe ſaid, This is my dear huſband; and took him about the neck and kiſſed him.

Mr. *Green* depoſed, That he was with them before the recorder, and the lady owned, She was married to the gentleman by her own conſent, without force or compulſion; and the recorder anſwered, He was afraid ſhe was drawn in by that ſpark, a bully of the town; and Mr. *Swendſen* and the witneſs being ſent out, he did not know what ſhe ſaid afterwards.

Then

Then the priſoner called ſeveral to his reputation. One ſaid, He had dealt with him for 3000l. Another ſaid, He had a good character in *Norway*, and ſeveral ſhips were conſigned to him; and a third ſaid, He knew him, and he was eſteemed worth 10,000 dollars in *Norway*, and held to be a very honeſt man.

Here Mr. Solicitor-General obſerved, That the priſoner had given no anſwer to the principal part of their evidence, namely, the force; for if the taking and detaining Mrs. *Rawlins* was by force, as the witneſſes teſtified, and if ſhe was married while ſhe was under that force, no ſubſequent act or conſent of her's could leſſen the offence, if the jury ſhould give credit to the priſoner's evidence, and believe her conſent was real.

She had confeſſed, indeed, that after ſhe had been hurried from tavern to tavern, ſhe did declare he was her huſband, and that ſhe conſented to the marriage; but what afterwards happened plainly ſhewed it was through fear, and nothing elſe: Had ſhe really conſented to the marriage, why was ſhe carried to the juſtice of peace, to take an oath, that ſhe was married by her own voluntary conſent? while the priſoner held her by the hand before the recorder, ſhe confeſſed ſhe married with her free conſent; but as ſoon as the priſoner was withdrawn ſhe burſt into a flood of tears, and declared ſhe was married by conſtraint: he obſerved alſo from the licence, that the whole matter was of the priſoner's contriving, for the licence bore date three weeks before the time of the marriage, which ſhewed how long they had waited for an opportunity to accompliſh this deſign; and when he took out the licenſe he made oath her age was twenty-five, and his own thirty-five. Then the queen's counſel called a witneſs, to teſtify what the lady ſaid before the recorder; who depoſed, That while Mr. *Swendſen* held her by the hand ſhe owned the marriage, but when he was withdrawn ſhe threw herſelf upon him (the witneſs), and deſired him to ſtand by her, for ſhe was undone; and giving much the ſame evidence ſhe had done in court, ſhe ſaid what ſhe had done was all by force, and out of fear.

Then Mr. *Taylor* teſtified, That when the priſoner took out the licence, he made oath the lady was twenty-five; and that the licence was dated the day he took it out.

The Chief Juſtice then ſummed up the evidence, and gave the following directions to the jury.

1. You are to know, that if ſhe was taken away by force, and afterwards married, though by her conſent, yet is he guilty of felony; for it is the taking away by force that makes

makes the crime, if there be a marriage, though by her conſent.

2. In the next place it is to be obſerved, that ſhe was taken away by force, and a ſtratagem was uſed to give an opportunity thereunto, and the arreſt was but a colour.

3. You may conſider upon the evidence, how far the priſoner was concernedin the firſt force. It is true, he was not at the arreſt, and did not appear until ſhe was brought to *Hartwell*'s houſe; and under that pretence of bailing her, ſhe was carried to the *Vine* tavern, where there was a parſon ready, and the marriage was had in ſuch a manner as you have heard: now it is left to you to determine, whether the marriage was not the end of the arreſt; and if ſo, how it could be poſſible for ſuch a force to be committed to effect the priſoner's deſign, and he not to be privy to it?

4. If it can be imagined he was not privy to the colourable arreſt, yet ſhe was under a force when he came to her at *Hartwell's* houſe, and from thence ſhe was carried by force into the *Vine*-Tavern, where ſhe was married: that is a forcible taking by him at *Hartwell's* houſe: and though, when ſhe was at the *Vine*-Tavern, ſhe did expreſs her conſent to be married; yet it appears, even then, ſhe was under a force, and had no power to help herſelf: ſhe was alſo under a force when ſhe was carried to *Blake*'s, and put to bed, nay, when ſhe was carried to the Juſtice of Peace, even then ſhe was under a force; and all that ſhe ſaid was not freely, but out of fear: ſuch a force would avoid any bond, for ſhe was under impriſonment. But, however, if the firſt taking was by force, and ſhe had conſented to the marriage, the offence is the ſame; it is felony.

After the charge Mr. *Swendſen* deſired his wife might be aſked, whether ſhe did not, upon her knees, ſwear ſhe went away from him as good a maid as ſhe came to him.

The Chief Juſtice anſwered, that was a queſtion need not be aſked, ſince the marriage was ſo plainly proved: this was ſufficient to bring him within the ſtatute, though the marriage was never conſummated.

The Jury retired to conſider their verdict.

In the mean time *Sarah Baynton*, *John Hartwell*, and *John Spurr*, were ſet to the Bar, and a Jury charged with them; being indicted for aiding and aſſiſting the ſaid *Haagen Swendſen*, to bring about and accompliſh the ſaid forcible marriage with Mrs. *Pleaſant Rawlins*.

In opening the indictment and the evidence, Mr. Solicitor obſerved,

obſerved, That the law, to ſhew how odious ſuch offences were, and to deter all perſons whatever from committing them, had made no difference between the principals and acceſſaries; the abetters, procurers, and contrivers were declared and adjudged principal felons.

The evidence being called, Mrs. *Buſby* depoſed, as ſhe had done at the former trial, That Mrs. *Rawlins*'s father left her about 2000l. and her grandfather 20l. *per annum* in lands.

Mrs. *Nightingale* teſtified, That Mrs. *Buſby* and Mrs. *Rawlins* had lodged at her houſe three years, when Mrs. *Baynton* came under the character of a country gentlewoman, and took lodgings at her houſe, and introduced *Swendſon* as her brother. (As in *Swendſen's* Trial).

Mrs. *Buſby* alſo teſtified, That ſhe and Mrs. *Rawlins* were arreſted in a coach, and carried to the *Star and Garter* in *Drury-Lane* (as at the former trial): and the Court demanding, If Mrs. *Baynton* and *Hartwell* were at the tavern with them, ſhe anſwered, Mrs. *Baynton* was there, and pretended to go for friends to bail them; but did not come again while ſhe was there. That *Hartwell* forced the young lady from her at the tavern; and when ſhe put her head out of the window, and cried after her, *Spurr* ſaid, What have you got by your bawling? We are better known here than you are. This was the firſt notice ſhe took of *Spurr*, but ſhe underſtood he rode behind the coach that brought them thither, and that he was left to keep her, when Mrs. *Rawlins* was forced away from her.

Wakeman, the bailiff's follower, depoſed, That *Hartwell* employed him in this arreſt, and told him the writ was againſt Mrs. *Rawlins:* that *Spurr* ſtopped the coach, and *Hartwell* ordered it to drive to the *Star and Garter* tavern; and when they were there, *Hartwell* came to the young lady, and ſaid, You muſt go to my houſe; and ſhe ſaid, O Lord, don't part us: but he forced her away, put her into a coach, and carried her thither; and from *Hartwell*'s houſe ſhe was carried to the *Vine*-Tavern in *Holborn*. The Court demanding, if they had any writ againſt Mrs. *Buſby*, *Wakeman* anſwered, No; and that againſt Mrs. *Rawlins* was but for 20l. though *Hartwell* ſaid, it was for 200l. And that when he went away, he left *Spurr* and *Hartwell* at the *Vine*-tavern.

Then Mrs. *Rawlins* teſtified, That ſhe was arreſted on the 6th of *November*, as ſhe was going in a coach to *Oxenden* chapel, and carried to the *Star and Garter* tavern; where *Hartwell* forced her from Mrs. *Buſby*, carried her to his own houſe,

houſe, and from thence to the *Vine*-tavern in *Holborn*, as ſhe had done at the trial of *Swendſen*.

Hartwell demanding of Mrs. *Rawlins*, which of them was *Hartwell*; ſhe anſwered, That his name was *Hartwell*; and that he took her about the middle, forced her away, and drove her down ſtairs; and when ſhe cried out murder, he ſaid, If ſhe did not hold her tongue he would ſend her to *Newgate* that minute: and having her at his houſe in *Witch-Street*, Mrs. *Baynton* came in, pretending ſhe heard her name as ſhe paſſed by, and ſaid ſhe would ſend for her brother to bail her; whereupon ſhe went out, and returned with her brother *Swendſen* in half a quarter of an hour: after which, Mrs. *Baynton*, her brother, and *Hartwell*, carried her in a coach to the *Vine*-tavern in *Holborn*, and *Holt* was there for the other bail: they were willing to take him, but were very ſcrupulous about *Swendſen*'s being bail; and told her, in ſhort, ſhe muſt marry *Swendſen*, and that would put an end to it. Mrs. *Baynton* ſaid, If ſhe did not marry her brother, ſhe muſt go to *Newgate*; that ſhe deſired her friends might be ſent for, but they would not permit it; and when ſhe refuſed to let Mrs. *Baynton* have her ring off her finger, ſhe forced it from her, and ſaid, She would go and get a wedding-ring made by it. That *Holt* brought in the parſon and clerk, and the parſon aſked no queſtions, but told her, If ſhe did not marry that gentleman ſhe ſhould be ſent to *Newgate*, and with many threats ſhe was at length prevailed on to marry *Swendſen*; but ſhe did it not out of fear of going to *Newgate*, but of being murdered. That ſhe did not ſtay at the *Vine* a quarter of an hour after ſhe was married, but *Swendſen* and Mrs. *Baynton* carried her to *Blake*'s houſe in *Holborn*, where *Baynton* and *Blake*'s daughter undreſſed her, and ſhe was in bed there an hour or two. The Court demanding, if ſhe ſaw *Hartwell* at the *Vine*-tavern before ſhe was married; ſhe ſaid, Yes; *Hartwell* ſaid, he would conſider with Mrs. *Baynton* about the bail, and they all went out and left her alone, and Mrs. *Baynton* returned, and told here they refuſed the bail.

Mrs. *Baynton*, being directed to enter upon her defence, demanded of Mrs. *Rawlins*, If She did not ſay, when the family was at church, ſhe wiſhed Mr. *Swendſen* was there? and Mrs. *Rawlins* anſwering, ſhe did not remember ſhe ſaid ſo; Mrs. *Baynton* aſked her, If ſhe did not come to her bed-ſide, and kiſs and hug her, and talk with pleaſure of Mr. *Swendſen*? Mrs. *Rawlins* anſwered, May-be ſhe might do ſo; but ſhe did not ſpeak it with a deſign to have him.

Mrs. *Baynton* demanded, If ſhe did not ſay, ſhe had a

great deal of ill uſage, and that ſhe lived more like a ſervant than any thing elſe? Mrs. *Rawlins* anſwered, She did not know but ſhe might: and the Chief Juſtice demanding, Why ſhe did ſo? ſhe anſwered, ſhe could give no account of it.

The Chief Juſtice then aſked her, If ſhe bid Mrs. *Baynton* tell *Swendſen*, that ſhe knew a gentlewoman at her own diſpoſal, that would make him a very good wife? Mrs. *Rawlins* anſwered, She might ſay ſhe wiſhed her brother a very good wife, but ſhe did not ſpeak it with a deſign to marry her brother; but was reſolved to take advice of her friends.

The Court then demanded, If ſhe ever told Mrs. *Baynton* ſhe wiſhed herſelf Mr. *Swendſen*'s wife? She anſwered, ſhe could not tell whether ſhe did or not: but being aſked, if ſhe told Mrs. *Baynton* that, notwithſtanding what ſhe ſaid of Mr. *Swendſen*, ſhe would never marry without the conſent of her friends? She anſwered, She often ſaid, ſhe would never marry without their conſent.

It being demanded, If there had been any courtſhip carried on between Mr. *Swendſen* and her? She ſaid, No more courtſhip to her than to all the family: being aſked, If ſhe did not ſay ſhe would have no body but *Swendſen*? She denied ſhe ever ſaid ſo. Then Mrs. *Baynton* deſired ſhe might be aſked, Whether ſhe conſented to be taken away, directly or indirectly? Mrs. *Rawlins* replied, It was all without her knowledge; ſhe never conſented to it.

Being aſked, If ſhe did not ſend back Mr. *Pugh*'s letters, and deſired him to come no more, for ſhe would have nothing to ſay to him? She anſwered, She did ſend back his letters, but did not remember ſhe ſaid any thing to Mrs. *Baynton* about it.

The Court aſking, Why ſhe ſent his letters back? She ſaid, It was not upon Mr. *Swendſen*'s account; but upon ſome unhandſome things they had heard of him: and Mrs. *Buſby* ſaid, They were ſent back by their advice.

The Chief Juſtice again ſolemnly demanded of her, by the oath ſhe had taken, If ſhe conſented to her being taken away after the manner ſhe was, or gave any encouragement to Mr. *Swendſen*? She anſwered, No; ſhe did not know ſhe gave him any manner of encouragement.

Then Mrs. *Baynton* called her maid *Betty*, for a witneſs, if Mrs. *Rawlins* did not aſk her ſeveral times of Mr. *Swendſen*, and wiſh he would come and dine with them? And *Betty* anſwered, She never heard her but once.

Here *Swendſen*'s Jury returned into Court, and *Johnſon*, a *Dane*, who was one of the Jury, ſaid, They did not find any evidence,

evidence, that Mr. *Swendſen* was privy to the arreſt. The Chief Juſtice anſwered, Did not he go to *Hartwell*'s houſe, and from thence, while ſhe was under the force, go with her to the *Vine*-tavern, where he married her? Did not he take advantage of the force, and was that force to any other purpoſe but to compel her to marry him? There was no cauſe of action, either againſt Mrs. *Rawlins* or Mrs. *Buſby*. And *Johnſon* ſtill objecting, there was no violence uſed by *Swendſen*; the Court anſwered, if he was preſent when violence was uſed, then was violence uſed by him: it appeared very evident ſhe was under a force before ſhe was married, when ſhe was married, all night after, and the next day, when ſhe was at the Recorder's.

Johnſon replied, He did not believe Mr. *Swendſen* employed the bailiffs: to which the Court anſwered, If he did not ſet them to work, yet his act afterwards made it as bad as if he had actually employed the bailiffs: wherupon *Johnſon* ſaid, he agreed with the reſt; and the Foreman ſaid, They were now all agreed in their verdict, that *Swendſen* was GUILTY.

Then Mrs. *Baynton* proceeded in her defence, and ſaid to Mrs. *Rawlins*, Did not you undreſs yourſelf at Mrs. *Blake*'s? She anſwered, You undreſſed me: and being aſked, If ſhe did not ſay to Mr. *Swendſen*, when ſhe was in bed, Come to bed, my dear huſband, you muſt love no body in the world but me; and that ſhe loved him above all men in the world? ſhe anſwered, No, Mrs. *Baynton*, I did not; I have taken an oath this day, and I ſaid no ſuch things.

Mrs. *Baynton* ſaid, That Mrs. *Rawlins* would have written letters to Mr. *Swendſen*; but ſhe would not let her, and always acted as a friend to her.

The Chief Juſtice anſwered, If ſhe had no deſign but for her good, why did ſhe go to lodge at Mrs. *Nightingale's*, under pretence ſhe had a law-ſuit? and why did ſhe carry her out in the coach in order to be arreſted? Mrs. *Baynton* replied, She had carryed her out in a coach, and ſet her down ſeveral times. And then ſhe demanded of Mrs. *Rawlins*, If ſhe did not ſeveral times deſire to ſit next to *Swendſen* when they were at cards, and ſent for walnuts and apples to treat him? to which ſhe ſaid, She did indeed ſend for walnuts and apples; but not to pleaſure Mr. *Swendſen*.

The Court demanding of *Baynton*, Why ſhe ſaid Mr. *Swendſen* was her brother? ſhe ſaid, He was her brother by adoption: and aſked Mrs. *Rawlins*, if ſhe did not give Mr. *Swendſen* ſo much encouragement as to kiſs him, and go between his legs? Mrs. *Rawlins* thereupon ſaid, She took it upon her oath, ſhe never did ſo: and being aſked, If ſhe

did

did not love him? ſhe ſaid, No; not well enough to make him her huſband.

Then the Court aſked Mrs. *Baynton*, How ſhe lived, and if ſhe had not a child about four months ago? ſhe anſwered, She was married and could prove it; but ſhe did not think it proper, for ſome reaſons: and as to getting her living, ſhe had a ſiſter in *Barbadoes* that was very kind to her.

Then the Chief Juſtice demanded of *Hartwell*, Who ordered him to take out the writ againſt Mrs. *Rawlins*, at the ſuit of *Jones*? *Hartwell* anſwered, It was Mr. *Holt*, who kept the *Mitre* tavern at *Weſtminſter*; and being at Mr. *Holt's* houſe, Mrs. *Baynton* came in, and gave him money for the writ; and he ſent *Spurr*, his follower, for it: that when he carried them to the *Star and Garter* Tavern, Mrs. *Baynton* bid him take care of his priſoner, Mrs. *Rawlins*, and take her with him to his houſe, or he would loſe his money; and thereupon he carried her to his houſe, and having buſineſs elſewhere, he left her with his wife; and when he came home again, he found Mr. *Swendſen* and Mrs. *Baynton* there, drinking a pint of ſack: and they told him, if he would go to the tavern, the buſineſs ſhould be made up; and they went in a coach to the *Vine*-tavern, where the matter was made an end of; but he knew of no writ againſt Mrs. *Buſby*. Then he called a witneſs, who teſtified, That Mrs. *Baynton* confeſſed before the Recorder, ſhe employed *Hartwell* to ſue out the writ againſt Mrs. *Rawlins*, and gave him money; but *Hartwell* ſaid, His principal witneſs, Mr. *Holt*, was fled: and aſking Mrs. *Rawlins*, If ſhe was not free to go to the *Vine*-tavern? ſhe anſwered, She did not deny, but ſhe went freely thither; nor was there any rudeneſs offered her then.

It being demanded of *Spurr*, what he had to ſay? He anſwered, He knew nothing more of the matter, than that *Hartwell* gave him the money to take out the Marſhal's-Court Writ, and he was employed by him.

Then the Chief Juſtice having ſummed up the evidence, ſaid, If *Hartwell* was employed in this deſign, in order to take Mrs. *Rawlins* into cuſtody, to carry on this marriage, and was privy to it, then he was equally guilty; but if he did only act as a bailiff, and did not know the deſign, then he was not guilty. But his arreſting Mrs. *Buſby*, againſt whom he had no proceſs, and taking Mrs. *Rawlins* from Mrs. *Buſby* to his own houſe, and from thence carrying her to the *Vine*-tavern; his pretending that the warrant was for 120l. when as in truth it was but for twenty pounds; and his pretending that the parſon was to be bail, though he was not preſent in the room where

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the marriage was, but hard by; yet he was in the ſame houſe, which is all one, if he knew what deſign was on foot: theſe are the things you are to conſider of. As for Mrs. *Baynton*, ſhe pretended ſhe was a widow, and you hear how ſhe proves it: and when ſhe is taxed with having a child, then ſhe ſaith ſhe has a huſband; and when ſhe is aſked about him, ſhe will give no account, nor how ſhe ſupports herſelf. She ſaid indeed, She paid every body their own; and that ſhe has no difference with any body whatſoever. She pretended ſhe was Mrs. *Rawlins*'s friend in what ſhe did; but it is plain, by what ſhe owns herſelf, that ſhe employed *Hartwell*, and paid him for the writ: and her pretending to ſet them down at *Oxenden* chapel, there it was her deſign to bring them under that force to effect this marriage. I muſt leave it to you to conſider, whether from the beginning to the end, ſhe was not an actreſs and a manager of this whole buſineſs. She hath been aſked, how Mr. *Swendſen* came to be her brother? 1ſt. She ſays, he was her deceaſed ſiſter's huſband: then being aſked, who was that ſiſter? ſhe ſaid, He was an adopted ſiſter's huſband. It was very extraordinary for her to go to Mr. *Hartwell*'s houſe to the young gentlewoman, and pretend ſhe came by chance, and heard her name. I muſt leave it to you, Gentlemen of the Jury, to conſider of the whole matter: and as for *Spurr*, he was an under officer, a bailiff's follower, and might be ignorant of the buſineſs. You have not evidence enough to make it appear, that he was privy to this deſign, and therefore you are to acquit him: but as to Mrs. *Baynton* and *Hartwell*, if they were privy to this deſign of forcibly taking away of Mrs. *Rawlins* with an intent to marry her to Mr. *Swendſon*, as it is plain he was an actor, and ſhe an abettor in the force; then, gentlemen, you are to find them guilty: if you are not ſatisfied, you are to acquit them.

The Jury being withdrawn, after half an hour's receſs, returned into Court with their verdict, that *Sarah Baynton* was GUILTY; but *Hartwell* and *Spurr* were Not Guilty. Whereupon the Chief Juſtice told *Hartwell*, he had met with a very merciful Jury, and adviſed him to take care for the future.

The priſoners, *Haagen Swendſon*, and *Sarah Baynton*, were called to judgment on the 28th of *November*; and it being demanded of *Swendſen*, what he had to ſay, why ſentence of death ſhould not paſs upon him? He inſiſted, That Mrs. *Rawlins* had varied in her evidence, and confeſſed ſeveral things in Mrs. *Baynton's* trial, that ſhe denied in his. Mrs. *Baynton* made the like obſervation; and added, That ſhe was

with

with child: to which my Lord Chief Juſtice replied, That was no plea againſt judgment.

Then Mr. Juſtice *Powell* obſerved, How great a crime this fortune-ſtealing was; how much worſe than any other kind of robbery: and that though *Swendſen* was not at the firſt taking, yet there were ſtrong preſumptions to conclude him privy, and conſenting to it; and particularly his having a licenſe prepared for the marriage: that ſuppoſing he was not privy to the arreſt at firſt, yet knowing of the force, and being preſent afterwards, when ſhe was threatened to be ſent to *Newgate*, if ſhe did not marry him, and taking advantage of her being under theſe menaces; this was, in law, a forcible taking. Then he paſſed ſentence of death on Mr. *Swendſen* and Mrs. *Baynton*: after which *Swendſen* acknowledged the arreſt to be all his own contrivance, and not Mrs. *Baynton*'s: and Mrs. *Baynton* declaring ſhe was with child, a Jury of matrons were impannelled, and brought her in quick[a] with child; whereupon execution was reſpited till after her delivery: and her friends afterwards obtained her pardon; but *Swendſen* was executed at *Tyburn* in purſuance of his ſentence.

The Execution of *Haagen Swendſen*, on the 9th of *December*, 1702.

Haagan Swendſen, being brought to the place of execution, referred himſelf to the following paper; which he left with the two divines who attended him.

"I DO believe the world will expect I ſhould ſay ſomething for their ſatisfaction. That I had a deſign to have Mrs. *Rawlins*, for my wife, is moſt true. I was told of her by a neighbour and friend of hers; and then made a

[a] Where a pregnant woman is capitally convicted, ſhe may plead her pregnancy, and execution will be poſtponed until her delivery. This is a mercy dictated by the law of nature, *in favarem prolis*. In caſe this plea be made in ſtay of execution, the judge muſt direct a jury of twelve matrons or diſcreet women to inquire the fact, and if they bring in their verdict *quick with child* (for barely, *with child*, unleſs it be alive in the womb, is not ſufficient) execution ſhall be ſtaid generally till the next ſeſſion; and ſo from ſeſſion to ſeſſion, till either ſhe is delivered, or proves by the courſe of nature not to have been with child at all. But if ſhe once hath had the benefit of this reprieve, and been delivered, and afterwards becomes pregnant again, ſhe ſhall not be entitled to the benefit of a farther reſpite for that cauſe. For ſhe may now be executed before the child is quick in the womb; and ſhall not, by her own incontinence, evade the ſentence of juſtice. 4 *Black. Com* 395.

further enquiry, and found her quality ſuch, as I might, without any exceptions, preſume to, her father being the ſon of a tradeſman: the next was, how to get into her acquaintance; and not knowing how to be introduced, I prevailed with, and perſuaded Mrs. *Baynton* to take a lodging in the ſame houſe with Mrs. *Rawlins;* by which means, I found eaſy acceſs to my wiſhes, and was as welcome to the family as if I had been one of themſelves. I had their company on board a ſhip, where I gave them an entertainment; and was invited to dine with them; and, by degrees, I poſſeſſed myſelf of Mrs. *Rawlins*'s affection ſo far, that ſhe ſeemed uneaſy without me, and frequently importuned for my ſpeedy return, and obliged me to ſit next to her at table, ſaying, that if I did not, ſhe would not eat; and treated me with many private careſſes; by which lovers, who have not frequent opportunity of ſpeaking, do, by ſigns and tokens, expreſs themſelves.

"I do declare, I had as good reception as lover could wiſh for; and all the encouragement imaginable; inſomuch, that nothing ſeemed diſagreeable to my intentions, but all things did promiſe to facilitate my deſign with ſucceſs, ſhe herſelf having told me, that ſhe was at her own diſpoſal, and would marry to pleaſe herſelf.

"My familiarity with Mrs. *Rawlins*, before my marriage, was ſo great, that there was no room left for me to practiſe violence upon her; though I muſt ſay, I was impatient of delays, and wiſhed for an opportunity to accompliſh my deſire.

"But as for the unhappy contrivance of the arreſting Mrs. *Rawlins*, I had no ſhare in it, but was perſuaded to conſent to it, by Mr. *Holt* and his wife, and when the intrigue was brought to perfection, I complied, and laid hold of the opportunity, in order to marry Mrs. *Rawlins*, which, with little difficulty, and leſs perſuaſion, I accompliſhed; ſo having, without any force or violence, declared to the miniſter, that ſhe was at her own diſpoſal, and free to marry me, which the miniſter declared in open Court at my trial.

"After we had been in bed, comes in one Mr. *Bennet*, a conſtable, with ſome of Mrs. *Rawlins*'s relations, who required me to go with them before a Juſtice of Peace: finding they had no warrant, I refuſed to give obedience to their commands, which created ſome diſpute; and my wife, hearing the noiſe, came out of the bed-chamber, deſiring me to be quiet, and let her ſpeak to them; which accordingly ſhe did, in theſe expreſs words following; *viz.* Couſin, I have married this gentleman with my own free conſent; he is my huſband, and this is my wedding-ring, ſhewing the

the ring on her finger: as for Mr. *Buſby*, I will give him under my hand, he ſhall come into no trouble; and what would you have more?

"Then ſaid they, If it be ſo, then God bleſs you both together, and drank a flaſk of wine or two with me, and then departed: they were no ſooner gone, but I aſked her, whether ſhe would be willing to appear, and declare what ſhe had ſaid to her friends to a Juſtice of Peace? and ſhe ſaid, ſhe would, with all her heart. Then we went to Mr. Juſtice *Baber*, in *York-buildings*, and ſhe declared the ſame to him; he told her he would take notice of her face, and bid her ſtick to that.

"The next day, about eleven of the clock, there came a conſtable with a warrant, and carried us before the Recorder, unto whom ſhe ſaid the ſame thing over and over. Then ſaid the Recorder, Alas! child, they made you drunk, and you did not know what you did: to which ſhe anſwered, That there were a great many there preſent, that knew her life and converſation, that ſhe did not uſe to be drunk: and when the Recorder could not prevail with her, he conceived that my being perſonally with her, obliged her to ſtand ſo firm to her marriage: he then ordered me to be pulled away by force from her, at which ſhe fell a weeping; how ſhe afterwards was lectured by her friends, was ſufficiently atteſted by my proſecution, trial, and ſentence; and after I was committed to *Newgate*, I was removed by a Habeas Corpus to the *Queen's-Bench* bar, there to be arraigned, and pleaded not guilty to the indictment. I pleaded for longer time to prepare for my trial, but was allowed but four days; when I was brought to my trial, I moved for a Counſel to plead my cauſe, as being a ſtranger, and not acquainted with the laws of *England*. My life being thus at ſtake, a powerful intereſt againſt me, and the Court not for me, rendered my caſe both deſpicable and deplorable: and as for ſome of my evidence, I do verily believe they were bribed by the adverſe party, others taken off by ſiniſter art, and ſome hindered by force from appearing in Court for me; as for Mr. Juſtice *Baber*, he ſhewed himſelf but coldly in giving his teſtimony, and ſaid, That my wife did confeſs before him, that ſhe was married by her own free conſent; but at the ſame time added, that ſhe ſeemed very much diſordered. As for that gentleman I forgive him, and ſhall leave God to be judge between him and me.

"It is to be noted, that my wife did not deny in open Court, that ſhe had made the declaration aforeſaid of her marriage to Mr. *Bennet*, the conſtable, and others, that night we were married, but ſaid, She did not know what ſhe did when ſhe

ſaid ſo; and many other things ſhe poſitively upon oath denied at my trial, which makes me have pity upon her poor ſoul, conſidering ſhe confeſſed many things at Mrs. *Baynton's* trial, which ſhe denied upon oath at mine. The world may ſee what it is to be a ſtranger and unacquainted with the laws; nay, I myſelf heard my wife openly confeſs in Court, in Mrs. *Baynton's* trial, that there was a young lady in the world, who was at her own diſpoſal, that wiſhed me a good wife; and at laſt confeſſed ſhe herſelf was the perſon.

" Among my many misfortunes, I was repreſented by my wife's friends, to the Court, to be a ſharper and a bully; but I called in and produced ſeveral gentlemen of repute, to give an account of my life and converſation, who have accordingly atteſted the honeſty of my principles by my practice.

" It is further obſervable, how my Jury diſagreed about my verdict: there was one of them, Mr. *Eraſmus Johnſon*, a perſon to me altogether a ſtranger; for I declare in the preſence of Almighty God, that I do not remember to have been in his company three times in my life, except in church: this Mr. *Johnſon* alledged, that none of the evidence did prove, or ſwear, that I had any hand in the arreſt, nor uſed any force or violence to the gentlewoman, but ſhe confeſſed the marriage, which was proved by ſeveral witneſſes; which rendered my caſe ſo hard, that the ſaid Mr. *Johnſon* inſiſted upon it to have me diſcharged, according to the dictates of his conſcience; but at laſt he was over-ruled.

" Since my conviction, I have uſed all the means I could to procure my pardon; but finding little or no probability of it, I am now going to beg for entrance at the gate of mercy in heaven, which I beſeech God to open for me.

" I expected my trial ſhould be publiſhed, that the world might ſee my treatment, what I have done, and what I have left undone in my caſe; but I am informed it may not be printed. I have ſaid this, only to do myſelf juſtice, although I could ſay a great deal more of moment to the purpoſe; but my time being ſo very ſhort and precious, I muſt employ that little time to the ſaving of my moſt precious part, my ſoul.

" I humbly beſeech mankind to believe me, and that what I have ſaid or ſhall ſay, are the words of a dying man: this is not the time for me to equivocate, nor to go out of the world with a lie in my mouth. I do therefore declare, and call the Great Omnipotent God of heaven to my witneſs, that I have aſſerted nothing, to the beſt of my knowledge, but the whole truth, nor uttered a ſyllable out of malice or bitterneſs of heart, againſt any perſon whatſoever;

but

but ſo far from it, I do frankly forgive all my enemies, and beſeech God to put it into their hearts to repent of their ſins.

" As for my wife, I am ſo much in charity with her, that I cannot believe the ſeverity extended to me, did altogether proceed from herſelf; but her conſenting to ſpill my blood, makes the guilt her own: God of his great mercy give her a true ſenſe of her crimes, that the heavy judgment, hanging over her head, may not deſcend upon her.

" As for Mrs. *Baynton*, who is likewiſe under ſentence of death for the ſame account with myſelf, as I have in the Court, ſo do I now again poſitively declare, ſhe had no hand in the intrigue of my marriage, any more than what ſhe did by my ſpecial direction and perſuaſion; for Mrs. *Baynton* was wholly a ſtranger to Mrs. *Rawlins*, until the unhappy contrivance of my marriage made them acquainted: neither did I know Mrs. *Baynton* till *June* laſt paſt, though ſome have been pleaſed to ſay, I kept her company for three years, and have had two children by her; all which I declare is a wrong notion, and nothing of truth in it. The only load I have on my conſcience, is her death, of which I am the unhappy inſtrument; I beſeech God in his mercy to move the Queen's clemency to ſpare her life, that her blood may not riſe in judgment againſt me.

" As for myſelf, I am now going to ſuffer an ignominious death, for a crime which my own conſcience doth not accuſe me of, but the rigour of the law has made it my unpardonable crime; and as I forgive all mankind, ſo I beg forgiveneſs of thoſe, whom, through inadvertency or otherwiſe, I have injured or offended, beſeeching God of his great mercy, to vouchſafe them forgiveneſs whenſoever they ſhall aſk it.

" My great comfort is, that I have reconciled myſelf with my God, and that I die in my natural ſenſes; and that ſhort time I have had ſince my trial, I truſt in my Saviour I have not miſ-ſpent.

" And now, O Lord God, of thy infinite goodneſs, hear my petition, pardon my offences, and forgive me my ſins: forgive mine enemies, and lay not my blood to their charge; but grant that a ſincere repentance may waſh away their guilt.

" I am now going out of this vale of calamity and ſin to my eternal repoſe, where, through the merits of my Saviour Jeſus Chriſt, I hope to ſee God in his glory: and ſo I conclude, O Lord, receive my ſoul into thy boundleſs mercy, for the merits of my Saviour Jeſus Chriſt. *Amen.*" *State Trials*, Vol. V. p. 449.

STRIKING

STRIKING IN THE KING's PALACE.

CONTEMPTS againſt the king's *Palace*, or *Courts of Juſtice*, have always been looked upon as high miſpriſions: and by the antient law before the Conqueſt, fighting in the king's palace, or before the king's judges, was puniſhed with death. At preſent by Statute 33 Henry VIII. c. 12. A. D. 1541. Malicious ſtriking in the king's palace, wherein his royal perſon reſides, whereby blood is drawn, is puniſhable by perpetual impriſonment, and fine at the king's pleaſure, and alſo with loſs of the offenders right hand, the ſolemn execution of which ſentence is preſcribed in the ſtatute at length. A few months after this act had paſſed, Sir *Edmond Knevet* was proſecuted for this offence: the ſolemnities of the puniſhment required by the act are therein ſtated.

The tenth of *June*, 1541, Sir *Edmond Knevet*, knight of *Norfolke*, was arraigned before the king's juſtices (ſitting in the great hall at *Greenwich*, maſter *Gage* comptroller of the king's houſhold, maſter *Suthwell*, Sir *Anthony Browne*, Sir *Anthony Wingfield*, maſter *Wriſley*, and *Edmond Peckham*, cofferer of the king's houſhold) for ſtriking of one maſter *Clere*, of *Norfolke*, ſervant with the earle of *Surrey*, within the king's houſe in the *Tenice Court*. There was firſt choſe to go upon the ſaid *Edmond*, a queſt of gentlemen and a queſt of yeomen, to enquire of the ſaid ſtripe, by the which inqueſts he was found guilty, and had judgment, to looſe his right hand; whereupon was called to do the execution, firſt the ſergeant chirurgion, with his inſtrument appertaining to his office: the ſergeant of the woodyard with the mallet and a block, whereupon the hand ſhould lie: the maſter cooke for the king with the knife: the ſergeant of the larder to ſet the knife right on the joynt: the ſergeant farrier with his ſearing yrons to ſeare the veines: the ſergeant of the poultry with a cock, which cock ſhould have his head ſmitten off upon the ſame block, and with the ſame knife: the yeoman of the chandry with ſeare clothes: the yeoman of the ſcullery with a pan of fire to heate the yrons: a chafer of water to coole the end of the yrons: and two fourmes for all officers to ſet their ſtuff on: the ſergeant of the ſeller with wine, ale and beere: the yeomen of the ewry in the ſergeant's ſteed, who was abſent, with baſon, ewre, and towels. Thus every man in his office ready to do the execution, there was called forth Sir *William Pickering*, knight marſhall, to bring in the ſaid *Edmond Knevet*; and when he was brought to the barre, the

Chiefe

Chiefe Juſtice declared to him his treſpaſs, and the ſaid *Knevet* confeſſing himſelfe to be guilty, humbly ſubmitted him to the king's mercy: for this offence he was not only judged to looſe his hand, but alſo his body to remaine in priſon, and his lands and goods at the king's pleaſure. Then the ſayd Sir *Edmond Knevet*, deſired that the king of his benigne grace, would pardon him of his right hand, and take the left: for (quoth he) if my right hand be ſpared, I may hereafter do ſuch good ſervice to his grace, as ſhall pleaſe him to appoint. Of this ſubmiſſion and requeſt, the juſtices forwith informed the king, who of his goodneſs, conſidering the gentle heart of the ſaid *Edmond*, and the good report of lords and ladies, granted him pardon, that he ſhould loſe neither hand, land, nor goods, but ſhould go free at liberty. *Stowe's* Annals, *How's* edit. 581.

On the above proſecution, *Hargraves* in his edition of the 11 vol. State Trials, remarks, that cutting off the hand is a rare puniſhment by the *Engliſh* law, and the cruelty of it being conſidered, it muſt give pleaſure to the humane reader to know, that there are very few inſtances of inflicting it. We are not aware, that there are any crimes which by our law are liable to be ſo puniſhed, except drawing a weapon on one of the king's judges, and ſtriking in the king's courts or palaces; and ſo unfrequent have been both theſe crimes, that perhaps all our books do not furniſh ten caſes of the ſort. 3 Inſt. 140. Dy. 188.

The manner in which Sir *Edmond Knevet* obtained a pardon of his offence, muſt ſtrike every reader of ſenſibility. The circumſtances do equal honour to Sir *Edmond* and his ſovereign; to the former for his manly requeſt, to pay the forfeit by his left hand inſtead of his right, that he might be better able to ſerve his king and country; to the latter, for feeling the greatneſs of mind which ſuch a requeſt denoted.

With reſpect to *ſtriking* in the king's ſuperior courts of juſtice in *Weſtminſter*, or the aſſizes; it is an offence made ſtill more penal than even in the king's palace. For a ſtroke or blow, in ſuch a court of juſtice, *whether blood be drawn or not*, or even aſſaulting a judge ſitting in the court, by drawing a weapon, without any blow ſtruck, is puniſhable with the loſs of the right hand, impriſonment for life, and forfeiture of goods and chattles, and of the profits of his lands during life. The reaſon ſeems to be (ſays Sir *William Blackſtone*), that thoſe courts being antiently held in the king's palace, and before the king himſelf, ſtriking there included the former contempt againſt the king's palace, and ſomething more, viz. the diſturbance of public juſtice.

SABBATH

SABBATH BREAKING.

PROFANATION of the Lord's day, vulgarly (but improperly) called *Sabbath breaking*, is an offence againſt God and religion, puniſhed by the municipal law of *England*. —For, beſides the notorious indecency and ſcandal of permitting any ſecular buſineſs to be publickly tranſacted on that day, in a country profeſſing chriſtianity, and the corruption of morals which uſually follows its profanation, the keeping one day in ſeven holy, as a time of relaxation and refreſhment, as well as for publick worſhip, is of admirable ſervice to a ſtate conſidered merely as a civil inſtitution. It humanizes by the help of converſation and ſociety the manners of the lower claſſes; which would otherwiſe degenerate into a ſordid ferocity and ſavage ſelfiſhneſs of ſpirit: it enables the induſtrious workman to purſue his occupation in the enſuing week with health and cheerfulneſs; it imprints on the minds of the people that ſenſe of their duty to God, ſo neceſſary to make them good citizens; but which yet would be worn out and defaced by an unremitted continuance of labour, without any ſtated times of recalling them to the worſhip of their maker. By the ſtatute 27. Hen. VI. c. 5. no fair or market ſhall be held on the principal feſtivals, good Friday, or any Sunday, (except the four Sundays in harveſt) on pain of forfeiting the goods expoſed to ſale. And, ſince by the ſtatute, 1 Car. I. c. 1. no perſon ſhall aſſemble, *out* of their own pariſhes, for any ſport whatſoever upon this day; nor, in their pariſhes, ſhall uſe any bull or bear beating, interludes, plays, or other *unlawful* exerciſes, or paſtimes; on pain that every offender ſhall pay 3s 4d to the poor. This ſtatute does not prohibit, but rather impliedly allows, any innocent recreation or amuſement, *within* their reſpective pariſhes, even on the Lord's day, after divine ſervice is over. But by ſtatute 29 Car. II. c. 7. No perſon ſhall exerciſe any worldly labour of their ordinary callings upon the Lord's day, or uſe any boat or barge, or expoſe any goods to ſale, except meat in publick houſes, milk at certain hours, and works of neceſſity or charity, on forfeiture of 5s. Nor ſhall any drover, carrier, or the like, travel upon that day under pain of 20s.

On the laſt mentioned ſtatute, *Peter Creps* a baker, was convicted by *Jonathan Durden*, a juſtice of peace, for ſelling ſmall

ſmall hot rolls of bread on the 16th of November 1776, being the Lord's day.—It having been proved, that he had ſold theſe rolls four ſeveral times on the ſame day, the juſtice deemed them ſeparate and diſtinct offences, and accordingly made four diſtinct convictions, and levied by four diſtinct warrants the ſum of 20s.

The baker, on the ground of their not being ſeparate and diſtinct offences, brought an action againſt the Juſtice, to recover back the ſum of 15s—the amount of three convictions.

Buller, on behalf of the baker, contended that the offence created by the ſtatute is "exerciſing his calling on the Lord's day;" and that therefore if the baker had continued baking from morning till night, it would be but one offence; that here were four convictions for one and the ſame offence; conſequently as to three, there is an exceſs of juriſdiction, and the action againſt the Juſtice maintainable.

Cowper, on the contrary for the Juſtice, contended that as there was evidence of four different acts, which for aught that appeared might have been carried on at four different places, the Court will not preſume to the contrary againſt the Juſtice, who has acted on them as four diſtinct offences.

Lord Mansfield. If there are four convictions, for one and the ſame offence, committed on one and the ſame day, three of them muſt neceſſarily be bad. On the conſtruction of the act of parliament, the offence is "exerciſing his ordinary trade on the Lord's day," and *that*, without any fraction of a day, hours or minutes. It is but one entire offence, whether longer or ſhorter in point of duration; ſo, whether it conſiſt of one, or a number of particular acts, the penalty incurred by the offence is *five ſhillings*. There is no idea conveyed by the act itſelf, that if a taylor ſews on the Lord's day, every ſtitch he takes is a ſeparate offence; or if a ſhoemaker or carpenter, work for different cuſtomers at different times on the ſame Sunday, that thoſe are ſo many ſeparate and diſtinct offences. There can be but one entire offence, on one and the ſame day. Killing a ſingle hare by an unqualified perſon, is an offence; but the killing ten more on the ſame day will not multiply the offence, or the penalty impoſed by the ſtatute for killing one. Here repeated offences are not the object which the legiſlature had in view in making the ſtatute: but ſingly to puniſh a man for exerciſing his ordinary trade and calling on a *Sunday*. Upon this conſtruction the Juſtice had no juriſdiction whatever in reſpect of the three laſt convictions: judgment was therefore given for the baker. *Creps v Durden, Court of King's Bench, Cowper's Reports*, 640. A. D. 1777.

LIBELS.

LIBELS.

Of the Province of a Jury in Proſecutions for Libels.

THIS has of late been a ſubject of much public diſcuſſion, heat and altercation. On one ſide it was holden to be the eſtabliſhed law of the land, that juries had nothing to do with the queſtion, whether a publication was libellous or not; that this was matter of law for the deciſion of the judges, and that it was the province of the jury only to aſcertain by their verdict the fact of publication, and the truth of the *inuendos*, i. e. that the publication had or had not thoſe criminal alluſions and intendments which were aſcribed to it in the indictment. On the other hand, it was contended that the jury had, by the law of the land, a right to bring in a general verdict of guilty or not guilty, involving matter of law and fact, and thereby to preclude the judges from any juriſdiction as to the queſtion of libel or no libel. The legiſlature at length thought proper to put an end to the diſpute, by an act of parliament; previous to ſtating which, it is proper to inſert the caſe that produced it.

The Dean of St. *Aſaph* was indicted for a libel, and tried before Mr. Juſtice *Buller*, at *Shrewſbury*, on the 6th of *Auguſt*, 1784; when the Judge, in ſumming up, told the Jury that there were only two queſtions for their conſideration—namely, the fact of the publication and the truth of the *inuendos*. And the Jury found the Defendant guilty of publiſhing, but whether a libel or not they did not find. A motion was made by *Erſkine*, in the *Michaelmas* term following, to ſet aſide the verdict, and for a new trial, for the miſ-direction of the Judge[a]: after the queſtion had been

[a] An application to the Court, to ſet aſide a verdict, and for a new trial, is one remedy whereby the party againſt whom the verdict is given may have relief in caſe of any defect of juſtice in the firſt trial. Of this ſort are want of notice of trial; or any flagrant miſbehaviour of the party prevailing towards the Jury, which may have influenced their verdict, or any groſs miſbehaviour of the Jury among themſelves; alſo if it appears by the Judge's report, certified to the Court that the Jury have brought in a verdict without, or contrary to evidence, ſo that he is reaſonably diſſatisfied therewith; or if they have given exorbitant damages, or if the Judge himſelf has miſdirected the Jury, ſo that they found an unjuſtifiable verdict: for theſe and other reaſons of a like kind, it is the practice of the Court to award a new, or ſecond trial: it being a maxim now

been argued at the bar, the Court took time to conſider, and Lord *Mansfield* delivered the opinion of the Court on a ſubſequent day in the ſame term, as follows:

Four

now adopted by the Courts that (in all caſes of moment) when juſtice is not done upon one trial, the injured party is entitled to another. But if two Juries agree in the ſame or a ſimilar verdict, a third trial is ſeldom awarded: for the law will not readily ſuppoſe that the verdict of any ſubſequent jury can countervail the oaths of the two preceding ones.

If every verdict was final in the firſt inſtance, it would tend to deſtroy this valuable method of trial, and would drive away all cauſes of conſequence to be decided according to the forms of the imperial law, upon depoſitions in writing; which might be reviewed in a courſe of appeal. Cauſes of great importance, titles to land, and large queſtions of commercial property, come often to be tried by a Jury, merely upon the general iſſue: when the facts are complicated and intricate, the evidence of great length and variety, and ſometimes contradicting each other; and where the nature of the diſpute very frequently introduces nice queſtions and ſubtilties of law. Either party may be ſurpriſed by a piece of evidence, which, (had he known of its production) he could have explained or anſwered, or may be puzzled by a legal doubt, which a little recollection would have ſolved. In the hurry of a trial the ableſt judge may miſtake the law, and miſdirect the Jury; he may not be able ſo to ſtate and range the evidence as to lay it clearly before them, nor take off the artful impreſſions which have been made on their minds by learned and experienced advocates. The Jury are to give their opinion *inſtanter*, that is, before they ſeparate, eat, or drink. And under their circumſtances the moſt intelligent and beſt intentioned men may bring in a verdict, which they themſelves upon cool deliberation would wiſh to reviſe.

Next to doing right, the great object in the adminiſtration of publick juſtice ſhould be to give public ſatisfaction. If the verdict be liable to many objections and doubts in the opinion of his counſel, or even in the opinion of bye-ſtanders, no party would go away ſatisfied unleſs he had a proſpect of reviewing it. Such doubts would with him be deciſive; he would arraign the determination as manifeſtly unjuſt; and abhor a tribunal which he imagined had done him an injury without a poſſibility of redreſs.

Granting a new trial, under proper regulations, cures all theſe inconveniences, and at the ſame time preſerves entire and renders perfect that moſt excellent method of deciſion, which is the glory of the Engliſh law. A new trial is a rehearing of the cauſe before another Jury; but with as little prejudice to either party, as if it had never been heard before. No advantage is taken of the former verdict on the one ſide, or the rule of court for awarding ſuch ſecond trial on the other: and the ſubſequent verdict, though contrary to the firſt, imports no title of blame upon the jury; who, had they poſſeſſed the ſame lights and advantages, would probably have altered their own opinion. The parties come better informed, the counſel better prepared, the law is more fully underſtood, the judge is more maſter of the ſubject; and nothing is now tried but the real merits of the caſe.

A ſufficient ground muſt however be laid before the Court, to ſatisfy them that it is neceſſary to juſtice that the cauſe ſhould be farther conſidered. Counſel are heard on both ſides to impeach, or eſtabliſh the verdict, and the Court give their reaſons at large why a new examination

ought

Four objections have been made to the direction of the Judge. The firſt, peculiar to this caſe, and therefore I begin with it, that he did not leave the evidence of a lawful excuſe or juſtification to the Jury, as a ground for acquitting the Defendant. Circumſtances merely of alleviation or aggravation are irrelevant upon the trial; they are immaterial to the verdict; and they may be made uſe of when judgment is given, to increaſe or leſſen the puniſhment. Circumſtances which amount to a lawful excuſe, or juſtification, are proper upon the trial, and can only be uſed then. Upon every ſuch defence, there ariſe two queſtions; one of law, the other of fact; the firſt to be decided by the Court, the ſecond by the Jury. Whether the fact alledged, ſuppoſing it true, be a legal excuſe, is a queſtion of law; whether the allegation be true, is a queſtion of fact, and, according to this diſtinction, the Judge ought to direct; and the Jury ought to follow the direction; though, by means of a general verdict, they are intruſted with the power of confounding the law and the fact, and follow the prejudices of their affections or paſſions.

The ſecond objection is, that the Judge did not give his own opinion, whether the writing was a libel, or ſeditious, or criminal.

The third was, that the Judge told the Jury they ought to leave that queſtion upon the record to the Court, if they had no doubt of the meaning and publication.

And the fourth, that he did not leave the Defendant's intent to the Jury.

The anſwer to theſe objections is, that by the conſtitution the Jury ought not to decide the queſtion of law, whether ſuch a writing, of ſuch a meaning, publiſhed without a lawful excuſe, be criminal; and that they cannot decide it againſt the Defendant, becauſe after a verdict it remains open upon the record: therefore it is the duty of the Judge to adviſe the Jury to ſeparate the queſtion of fact from the queſtion of law; and as they ought not to decide the law, and the queſtion remains entire for the court, he is not called upon to tell them his own opinion. It is almoſt peculiar

ought or ought not to be allowed. The true import of the evidence is duly weighed, falſe colours are taken off, and all points of law which aroſe at the trial are upon full deliberation clearly explained and ſettled.

In ſhort, long experience has ſhewn that a motion to ſet aſide a verdict and for a ſecond trial is the ſhorteſt, cheapeſt, and moſt effectual cure for all imperfections in the verdict; whether they ariſe from the miſtakes of the parties themſelves or their counſel or attornies, or even of the Judge or Jury. 3 *Black. Com.* 390.

liar to the form of a proſecution for a libel that the queſtion of law remains entirely open for the Court upon the record, and that the Jury cannot decide it againſt the Defendant; ſo that a general verdict, that the Defendant is guilty, is equivalent to a ſpecial verdict in other caſes. It finds all which belongs to the Jury to find, and finds nothing as to the queſtion of law. Therefore when the Jury are ſatisfied of every fact within their province to find, they have been adviſed to find the Defendant guilty, and in that ſhape to take the opinion of the Court upon the law; and no caſe has been cited of a ſpecial verdict, in a proſecution for a libel, leaving the queſtion of law upon the record to the Court; though to be ſure it might be left in that form: but the other is more ſimple and better. A criminal intent from doing a thing in itſelf criminal, without a lawful excuſe, is an inference of law. Where an innocent act is made criminal, when done with a particular intent, there the intent is the material fact to conſtitute the crime. The ſubject matter of theſe three objections has ariſen upon every trial for a libel ſince the revolution, now near an hundred years ago. In every reign there have been many ſuch trials, both of a private and public nature. In every reign there have been ſeveral defended with all the acrimony of party animoſity and a ſpirit ready to conteſt every point, and to admit nothing: but during all this time, as far as it can be traced, one may venture to ſay, that the direction of every judge has been conſonant to the doctrine of Mr. J. *Buller*; and no counſel has complained of it by an application to the Court. Counſel for the Crown, to remove the prejudices of the Jury, and to ſatisfy the byſtanders, have expatiated upon the enormity of the libel. Judges, with the ſame view, have done the ſame thing: both have done it wiſely with another view, to obviate the captivating harangues of defendant's counſel to the Jury, that they can and ought to find that in law the paper is no libel. But the formal direction of every judge, under which every lawyer has ſo far acquieſced as not to complain of it to the court, ſeems to me, ever ſince the revolution, to have been agreeable to the direction given in this caſe. It is difficult to cite caſes; the trials are not printed; unleſs a queſtion ariſes, notes are not taken: nobody takes a note of a direction of courſe not diſputed. We muſt, as in all caſes of tradition, trace backwards, and preſume from the uſage, which is remembered, that the preceding uſage was the ſame. The Craftſman was a celebrated party paper, written in oppoſition to the miniſtry of Sir *Robert Walpole*

by

by many men of high rank and great abilities: the whole party eſpouſed it. It was thought proper to proſecute the famous *Hague* Letter; I was at the trial; it happens to be printed in the ninth vol. of *St. Tr.* 255. There was a great concourſe, great expectation; and many perſons of high rank were preſent to countenance the Defendant. Mr. *Fazakerly* and Mr. *Bootle* were the leading Counſel for the Defendant; they ſtarted every objection and laboured every point; and when the Judge over-ruled them, he uſually ſaid, "If I am wrong, you know where to apply." The Judge was Lord Chief Juſtice *Raymond*, who had been eminent at the bar in the reign of Queen *Anne*, Solicitor and Attorney General in the reign of *George* the Firſt, and intimately connected with Sir *Edward Northey*; ſo that he muſt have known what the ancient practice had been. The cauſe was ſo blended with party paſſion, that it required his utmoſt attention; yet, when he came to ſum up, and direct, he did it as of courſe, juſt as Mr. Juſtice *Buller* did on this occaſion. *Fazakerley* and *Bootle*, very able lawyers, and connected in party with the writers of the Craftſman, never thought of complaining to the Court. The other trials before Lord *Raymond* are not printed, nor to be found in any notes; but to be ſure his direction in all was to the ſame effect. I recollect one where the Craftſman was acquitted, from a ballad made by Mr. *Pulteney*.—

> For Sir *Philip* well knows that his inuendos
> No longer will ſerve him in verſe or in proſe;
> For twelve honeſt men have decided the cauſe
> Who are judges of fact, tho' not judges of laws.

There are no notes of the trials before Lord *Hardwicke*, or Lord Chief Juſtice *Lee*, before 1752, when the caſe of the *King v. Owen* came on before Chief Juſtice *Lee*. It happens to be printed in the *State Trials*. I attended as Solicitor General; Lord Chief Juſtice *Lee*, the moſt ſcrupulous obſerver and follower of precedents, directed as of courſe in the ſame manner as was done in this caſe. When I was Attorney General, I proſecuted for ſome libels; one I remember was the *King v. Nutt*. He was convicted under the ſame direction by Lord Chief Juſtice *Ryder*. In the year 1756 I came into the office I now hold; and, upon the firſt proſecution for a libel which ſtood in my paper, I think it was the *King v. Shebbeare*, I made up my mind as to the direction I ought to give; and I have uniformly given the ſame almoſt in the ſame form of words. No counſel ever com-

complained of it to the Court. Upon every defendant being brought up for judgment, I have always ſtated the direction I gave, and the Court has always aſſented to it. The defence of a lawful excuſe never exiſted in any caſe before me: therefore I told the Jury, "if they were ſatisfied with the evidence of the publication, and that the meaning and inuendos were as ſtated, they ought to find the defendant guilty; the queſtion of law was upon the record for the judgment of the Court." The direction being as of courſe, and no queſtion raiſed concerning it in the Court, though I have had the misfortune to try many libels in very warm times againſt defendants moſt obſtinately and factiouſly defended, there are no notes or reports of what paſſed. In one caſe, the *King v. Woodfall*, on account of another kind of queſtion, there is a report; and there the direction is adopted by the whole Court as right, and the doctrine of Mr. Juſtice *Buller* laid down in expreſs terms. Such a judicial practice in the preciſe point from the revolution, as I think, down to the preſent day, is not to be ſhaken by general theoretical arguments or popular declamation. Every ſpecies of criminal proſecution has ſomething peculiar in the mode of procedure; therefore general propoſitions, applied to all, tend only to complicate and confound the queſtion. No deduction or concluſion can be drawn from what a jury may do from the form of the procedure to what they ought to do upon the fundamental principles of the conſtitution, and the reaſon of the thing, if they will act with integrity and a good conſcience. The fundamental definition of trials by jury depends upon an univerſal maxim, without an exception, *ad queſtionem*. Where the queſtions can be ſevered by the form of the pleadings, the diſtinction is preſerved upon the face of the record, and the jury cannot encroach upon the juriſdiction of the court. But where by the form of pleading the two queſtions are blended together, and cannot be ſeparated upon the face of the record, the diſtinction is preſerved by the honeſty of the jury. The conſtitution truſts that, under the direction of the judge, they will not uſurp a juriſdiction which is not their province. They do not know, and are not preſumed to know, the law; they are not ſworn to decide the law; they are not required to do it. If it appear upon the record, they ought to leave it there, or they may find the facts ſubject to the opinion ofthe Court upon the law. But, upon the reaſon of the thing, and the eternal principles of juſtice, the Jury ought not to aſſume the juriſdiction of law: they do not know, and are not preſumed to know, any thing of the mat-

matter: they do not underſtand the language in which it is conceived, or the meaning of the terms; they have no rule to go by but their paſſions and wiſhes. It is ſaid if a man give a right ſentence upon hearing one ſide only, he is a wicked judge, becauſe he is right by chance only, and has neglected taking the proper method to be informed; ſo a jury who uſurp the judicature of law, though they happen to be right, are themſelves wrong, becauſe they are right by chance only, and have not taken the conſtitutional way of deciding the queſtion. It is the duty of the judge, in all caſes upon general iſſues, to tell the jury how to do right, though they have it in their power to do wrong, which is a matter between God and their own conſciences. To be free is to live under a government by law. The liberty of the preſs conſiſts in printing without any previous licence, ſubject to the conſequence of law. The licentiouſneſs of the preſs is *Pandora*'s box, the ſource of every evil. Miſerable is the condition of individuals, dangerous is the condition of the ſtate, if there is no certain law, or (which is the ſame thing) no certain adminiſtration of law to protect individuals, or to guard the ſtate. Jealouſy of leaving the law to the court, as in other caſes, is now, in the preſent ſtate of things, puerile rant and declamation. The judges are totally independent of the miniſters that may happen to be, and of the king; their temptation is rather to the popularity of the day; and I agree with the obſervation, cited at the bar from Mr. Juſtice *Foſter*, that a popular judge is an odious and pernicious character. The judgment of the Court is not final. In the laſt reſort it may be viewed in the Houſe of Lords, where the opinion of all the judges is taken. In oppoſition to this, what is contended for? that the law ſhall be in every particular cauſe what any twelve men who ſhall happen to be the jury ſhall be inclined to think; liable to no review, and ſubject to no controul, under all the prejudices of the popularity of the day, and under all the bias of intereſt in this town, where thouſands, more or leſs, are concerned in the publications of newſpapers, paragraphs, and pamphlets. Under ſuch an adminiſtration of law no man could tell, no counſel could adviſe, whether a paper were or were not puniſhable. I am glad that I am not bound to ſubſcribe to ſuch an abſurdity, ſuch a ſoleciſm in politics; but that, agreeably to the uniform judicial practice ſince the revolution, warranted by the fundamental principles of the conſtitution of trials by jury, and upon the reaſon and fitneſs of the thing, I am of opinion this motion ſhould be rejected.

But the judgment was afterwards arreſted, on a defect in the indictment; and the dean of St. *Aſaph* acquitted. 3 *Durnford* and *Eaſt. Reports*, 428.

The above caſe was, as has been obſerved, attended and followed by great heat and altercation reſpecting the rights of juries in caſes of proſecution for libels; at length the diſpute was ended by ſtat. 32 *Geo.* III. c. 60, which declares that the jury may give a general verdict of guilty or not guilty upon the whole matter put in iſſue, and ſhall not be directed by the judge to find the defendant guilty, merely on the proof of publication of the paper charged to be a libel.

We find by the caſe of the dean of St. *Aſaph* that the conduct of every judge ſince the revolution in proſecutions for libels, has been exactly ſimilar to that of the learned judge before whom he was tried. It is much to be lamented that in all conteſted points, animoſity is too apt to involve in them perſonal reflections, which leave unfavourable, and very often very undeſerved impreſſions on the undiſcerning part of the public. There has been no inſtance, in which theſe impreſſions have been more unjuſt than in the preſent: for with reſpect to the learned Judge, before whom the dean of St. *Aſaph* was proſecuted, ſo far from there being any foundation for an unfavourable impreſſion, there is the firmeſt ground for ſentiments directly the reverſe. Judges are not legiſlators: it is a characteriſtic excellence of our legal conſtitution, that judges are bound to adminiſter the laws of the land as they are; whether perfect or imperfect. The judges are independent, and "their temptation is rather to the popularity of the day." Popular cry againſt the exiſtence of any particular law, ought not to extend to the judge who adminiſters it: it is his duty to adminiſter the law as it *is*, not as he, or as any other man thinks it *ought* to be; and it is to his honour, to continue inflexible and unmoved: *that* judge who could in the ſlighteſt degree attempt to warp the law, for popular favour, is unworthy of his office—he would not be proof againſt influence of a more dangerous nature. Whether the act of parliament abovementioned be founded in wiſdom or not, and wiſe men have doubted, we have a pleaſing reflection, in beholding our laws, adminiſtered by judges, who can perſevere with becoming dignity in the duties of their ſituation.

ARCHERY.

THE revival of archery renders the obſolete though ſtill exiſting laws relating thereto a ſubject of ſome curioſity. The firſt proviſion that appears in our ſtatute book on this head, was made in the 7 Hen. IV. c. 7. A. D. 1405. *For the well boiling, braſing and hardening of arrow heads*: as it is ſhort, a ſpecimen of the old French in which the ſtatutes were formerly penned, is given in the oppoſite column.

ITEM, "becauſe the arrow-ſmiths do make many faulty heads for arrrows and quarels, defective, not well, nor lawful, nor defenſible, to the great jeopardy and deceit of the people; and of the whole realm:" it is ordained and eſtabliſhed, that all the heads for arrows and quarels after this time to be made, ſhall be well boiled or braſed, and hardened at the points with ſteel; and if the ſaid ſmiths do make the contrary, they ſhall forfeit all ſuch heads and quarels to the king, and ſhall be alſo impriſoned, and make a fine at the king's will: that every arrow head and quarrel be marked with the mark of him that made the ſame: and the juſtices of peace in every county of *England*, and alſo the mayor and ſheriffs, and bailiffs of cities and boroughs ſhall have power to enquire of all ſuch deceitful makers of heads and quarels, and to puniſh as afore is ſaid.

ITEM, pur ceo qe les arrou-ſmythes font pluſours teſtes de ſetes & quarels, defectifs, nient bien ne loialment ne deffenſablement, a grant perill & deſceit du people & de tout le roialme; ordeignez eſt & eſtabliz, qe toutz les teſtes de ſetes & quarels, defore enavaunt affairs ſoient boilles ou braſes & dures a la point daſſer, et ſi aſcuns des ditz arrou-ſmythes les facent a contrarie, qils forsfacent toutes teilx teſtes & quarels au roy, & ſoient empriſonez & ent facent fyn a la volunte du roy. Et que cheſcun terdes des ſetes & qua quarels, ſoit ſeigne deceling que le fiſt. Et eint les juſtices de la pees en cheſcun counte *d'Engleterre*, & auxi les mairs viſcentes, & bailiffs des citees, & burghs deinz meſmes les citees, & burghs poair denquer des toutz tieux faux feſours de teſtes & quarels, & de les punir par manere come deſſuis eſt dit.

The

The next ſtatute on this ſubject, is the 12 Edward IV. c. 2. A. D. 1472, the preamble of which ſtates:

"Becauſe that our ſovereign lord the king, by a petition delivered to him in the ſaid parliament, by the commons of the ſame, hath perceived, That great ſcarcity of bow-ſtaves is now in this realm, and the bow-ſtaves that be in the realm be ſold at an exceſſive price, whereby the exerciſe of archery is greatly diſcontinued and almoſt loſt." It then proceeds to enact, that every merchant ſtranger, who ſhall bring into this land any merchandize from any country, from whence bow-ſtaves have been brought, ſhall bring in the ſame veſſel, four bow-ſtaves for every ton of merchandize, on pain of forfeiting 6s 8d for default of every bow-ſtave, and ſearchers and ſurveyors ſhall be aſſigned to mark thoſe that be not good.

In ten years afterwards, the 22 Edw. IV. c. 4. A. D. 1482, followed, premiſing that,

"Whereas in the time of the noble progenitors of our ſovereign lord the king that now is, and alſo in the time of the victorious reign of our ſaid ſovereign lord the king that now is, his ſubjects within every part of the realm have virtuouſly occupied and uſed ſhooting with their bows, whereby and under the protection of Almighty God; victorious acts have been done in defence of this realm: now ſo it is, that the bowyers in every part of this realm do ſell their bows at ſuch a great and exceſſive price that the king's ſubjects diſpoſed to ſhoot, be not of power to buy to them bows, whereby ſhooting is greatly diminiſhed and left, and unlawful games be uſed, contrary to ſtatute and ordinances thereupon made: it is therefore enacted that whoſoever ſhall ſell a long bow of yew above the price of 3s 4d ſhall forfeit 20s.

Then follows the ſtatute 1 Richard III. c. 11. A. D. 1483, the preamble ſtates that,

"It was ſhewed in the ſaid parliament by the bowyers inhabiting within the cities, towns and boroughs of this realm, occupying artillery pertaining to the ſame for the defence of this realm, that whereas, in times paſt, good and able ſtuff of bow-ſtaves hath been brought into this realm, as well by *Engliſh* merchants as ſtrangers, whereby the inhabitant bowyers, might competent live upon ſuch ſtuff, which they bought at 40s the hundred, or 46s 8d at the moſt: now it is ſo, that by the ſeditious confederacy of the *Lombards* uſing to divers parts of this realm, the bow-ſtaves be now at ſuch an outrageous price, that is to ſay at 8l the hundred, where they were wont to be ſold at 40s and alſo they will not ſuffer any garbling to be made of them, but

ſell good and evil at ſuch an exceſſive price together ungarbled, that by likelihood in ſhort time this realm is like to fail as well of ſtuff of artillery, as of workmen thereof, unleſs due remedy be in this behalf ſhortly found and had:" it then enacts that every merchant of *Venice*, ſhall with every but of *Malmſey*, and with every but of *Tyre*, bring ten bow-ſtaves, on pain of 13s 4d for every but of the ſaid wines. And no bow-ſtaves ſhall be ſold ungarbled, and only to perſons born under the king's obeyſance.

Then follows the 3 Hen. VII. c. 13. A. D. 1486, enacting that no long bow ſhall be ſold over the price of 3s 4d.

The next ſtatute is 3 Hen. VIII. c. 2. A. D. 1511, enacting that all ſorts of men under the age of 40 years, ſhall have bows and arrows and uſe ſhooting; certain perſons, excepted, &c.

This ſtatute was three years afterwards confirmed.

But both of them being found ineffectual, another act was paſſed in 33 Hen. VIII. c. 9. A. D. 1541, entitled, "A bill for the maintaining artillery and the debarring of unlawful games;" the preamble and ſubſtance of which are as follows:

I. Moſt humbly complaining, ſhew unto your highneſs your daily orators, the bowyers, fletchers, ſtringers and arrowhead-makers, of this your realm, that where for the advance and maintenance of archery, the better to be maintained and had within the ſame, and for the avoiding of divers and many unlawful games and plays, occupied and practiſed within this realm, to the great hurt and lett of ſhooting and archery, divers good and lawful ſtatutes have been deviſed, enacted and made, amongſt which one was in a parliament holden at *Weſtminſter*, in the third year of your moſt gracious reign, and the ſame act made perpetual in the parliament there holden in the ſixth year of your ſaid reign; the which good and laudable act notwithſtanding, divers and many ſubtil inventative and crafty perſons intending to defraud the ſame eſtatute, ſithens the making thereof, have found, and daily find many and ſundry new and crafty games and plays, as logetting in the fields, ſlide-thrift, otherwiſe called ſhove-groat, as well within the city of *London*, as elſewhere, in many others and divers parts of this realm, keeping houſes, plays and alleys for the maintainance thereof; by reaſon whereof archery is ſore decayed, and daily is like to be more and more miniſhed; and divers bowyers and fletchers, for lack of work, gone and inhabit themſelves in *Scotland*, and other places out of this realm, there working and teaching their ſcience, to the puiſſance of the ſame, to the

the great comfort of the eſtrangers, and detriment of this realm.

II. And where alſo your grace's ſubjects, bowyers, fletchers, and other artificers aforenamed, from time to time reſort, repair and come out of all places of this your realm into the city of *London*, for lack of living, and do inhabit nigh the ſame city, or in the ſuburbs of the ſame city, and in the ſtreets and lanes of the ſame city, being no freemen of the ſaid city, nor bearing neither ſcot, lot, nor other charges within your ſaid city, as other citizens and freemen of the ſame city do, and are bound to do, and by their oaths are ſworn to do, and which citizens and freemen of your ſaid city, of the myſteries and crafts before rehearſed, which have been brought up as apprentices from their youth, dwelling within the freedom of your ſaid city of *London*, are always in readineſs to furniſh your grace's affairs, when they ſhall be commanded; by reaſon of the which reſort and abode of ſuch foreigners and ſtrangers of the myſteries and crafts before rehearſed, in the ſuburbs, ſtreets, and lanes, of the ſame city, other cities, towns, villages and places within this realm, remain and be unfurniſhed of artificers and craftſmen before rehearſed, to the great decay of the archery of this realm; and for as much as it appeareth by the preamble of the ſaid ſtatute enacted the ſaid third year, which was eſtabliſhed and made perpetual in the foreſaid ſixth year of your moſt gracious reign, that your highneſs calling to your moſt noble and gracious remembrance, that by the feat and exerciſe of the ſubjects of this your realm in ſhooting in long bows, there hath continually grown and been within the ſame great number and multitude of good archers, which hath not only defended this realm, and the ſubjects thereof, againſt the cruel malice and danger of their outward enemies in time heretofore paſſed, but alſo with little number and puiſſance in regard have done many notable acts and diſcomfitures of wars againſt the infidels, and others, and furthermore ſubdued and reduced divers and many regions and countries to their due obeiſance, to the great honour, fame and unity of this realm and ſubjects, and to the terible dread and fear of all ſtrange nations, any thing to attempt or do to the hurt or damage of them, or any of them; yet nevertheleſs archery, and ſhooting in long bows was little uſed, but daily did miniſh, decay and abate more and more, for that much part of the commonality and poor people of this realm, whereby of old time the great number and ſubſtance of archers hath grown and multiplied, were not of power and ability to buy them long-bows of yew, to exerciſe ſhooting

in

in the ſame, and ſuſtain the continual charge thereof, and alſo by means and occaſions of cuſtomable uſage of tennis-play, bowls, cloyſh and other unlawful games prohibited by many good and beneficial ſtatutes by authority of parliament in that behalf provided and made, great impoveriſhment hath inſued, and many heinous murders, robberies and felonies committed and done, and alſo the divine ſervice of God by ſuch miſdoers on holy and feſtival days, not heard or ſolemniſed, to the high diſpleaſure of Almighty God, as by the foreſaid preamble more plainly may appear.

This ſtatute then proceeds to enact as follows.

III. Every ſubject, not lame nor having reaſonable impediment, being within ſixty years (except ſpiritual men and judges) ſhall uſe ſhooting in long bows, and have a bow and arrows ready in his houſe. Parents and maſters ſhall provide for each of their ſons and male ſervants (betwixt the age of ſeven and ſeventeen) a bow and two ſhafts, and cauſe them to exerciſe ſhooting, on pain of 6s 8d for default for one month. And ſervants (betwixt the age of ſeventeen and ſixty) ſhall be furniſhed with a bow and two arrows, and practiſe ſhooting therewith, on pain of 6s 8d.

IV. None under the age of twenty-four years ſhall ſhoot at any ſtanding mark (except at rovers, changing his mark every ſhoot) on pain of 4d a ſhoot; and none above that age ſhall ſhoot at any mark of eleven ſcore diſtance, or under, on pain of 6s 8d. And none under ſeventeen years ſhall ſhoot with a bow of yew, except his parents be worth 10l per annum, in lands, or forty marks in goods, on pain of 6s 8d a ſhoot. And the inhabitants of every town ſhall continue their buts in good repair, on pain of 20s for every five months default.

V. For every bow made of yew, the bowyer (not inhabiting *London*, or the ſuburbs thereof), ſhall make four of other woods on pain to forfeit for every ſuch bow unmade, 3s 4d; and the bowyers inhabiting *London*, or the ſuburbs, for every bow of yew, ſhall make two of other woods.

VI. The prices of them to be as follows. A bow of yew for a perſon between eight and fourteen years of age, not exceeding 1s. and for thoſe beyond that age at reaſonable prices, &c. (this and the preceding ſection were afterwards repealed by 8 Eliz. c. 10. A. D. 1565.)

VII. Fletchers

VII. Fletchers of *London*, ſhall ſell reaſonable timber to foreign fletchers without prejudice.

VIII. Artificers of archery, not freemen, nor paying ſcot and lot, ſhall remove their abode from *London*, and the ſuburbs thereof, to what other place they ſhall be aſſigned by his majeſty's counſel, the Lord Chancellor, treaſurer, privy ſeal, or one of them, on pain of 40s for every day they make their abode contrary to this act.

IX. Aliens ſhall not convey bows and arrows out of the realm, without his majeſty's licence, on pain of impriſonment, until they make fine, to be ſet by two juſtices in ſeſſions, and give ſecurity for the ſame.

X. Aliens ſhall not uſe ſhooting, on pain to forfeit their bows and arrows, to be taken from them by any of the king's ſubjects. And juſtices of aſſiſe, goal-delivery, and peace, in ſeſſions, and ſtewards in leets, ſhall hear and determine the breaches of this act. And the one moiety of all theſe forfeitures is given to the proſecutor, and the other where there is no leet, is given to the king; and where there is a leet, to the lord of that leet.

Next follows the ſtatute 8 Eliz. c. 10. A. D. 1565, entitled, "An act for bowyers;" reciting as follows:

I. Moſt humbly complaining ſheweth unto your highneſs, and to your high Court of parliament, your obedient ſubjects the bowyers, dwelling and inhabiting within the city of *London*, and the ſuburbs of the ſame, that where in the parliament of the late king of moſt famous memory, king *Henry* VIII. began and holden at *Weſtminſter* the ſixteenth day of January, in the three and thirtieth year of the reign of the ſaid late king, and there continued until the firſt day of April, then next following, there was an act and ſtatute then made and provided, intituled, "An act for the maintenance of artillery, and debarring of unlawful games;" in which act and ſtatute, amongſt other things, there is one branch contained and ſpecified, the tenor whereof is as hereafter followeth: That is to ſay, and to the intent that every perſon may have bows of mean price, be it enacted by the authority aforeſaid, that every bowyer dwelling out of the city of *London* ſhall, after the feaſt of the purification of our Lady then next coming, for every bow that he maketh of yew make four other bows meet to ſhoot in of elm, witch-haſel, aſh,

aſh and other wood apt for the ſame, under the pain to loſe and forfeit for every ſuch bow ſo lacking, three ſhillings and four-pence. And every bowyer dwelling within the city and ſuburbs of *London*, ſhall from and after the ſaid feaſt of the purification of our Lady then next coming, for every bow of yew make two other bows apt for ſhooting, of aſh elm, witch-haſel, or other wood meet for the ſame, under the like pain and forfeiture, as by the ſaid ſtatute now plainly it doth and may appear. And although the ſaid branch of the ſaid ſtatute be needful and expedient to remain and continue for ſuch bowyers as do dwell and inhabit in the country and other places out of the city of *London*, and the ſuburbs of the ſame; yet foraſmuch as there be very few or no bows of elm, witch-haſel, or aſh, or any other wood than only of yew, uſed or occupied by any perſon within the ſaid city and ſuburbs of the ſame, therefore the ſaid branch of the ſaid act and ſtatute before rehearſed was not, nor is needful to be had and made for the bowyers dwelling within the ſaid city and ſuburbs.

II. And yet nevertheleſs your ſaid ſubjects, for the avoiding of the danger and penalty contained in the ſaid branch, are daily inforced to make ſuch great number of bows of elm, witch-haſel and aſh, that they cannot in convenient time utter and ſell the ſame, but are conſtrained to keep ſuch bows by them ſo made, until they be putrified and not meet for any good uſe and purpoſe.

III. By reaſon whereof, much of the ſaid wood of elm, witch-haſel and aſh, is daily waſted and conſumed in making of the ſaid bows, and your ſaid ſubjects by ſuch loſſes as they daily ſuſtain in making ſuch bows greatly impoveriſhed, and the common wealth, thereby nothing advanced, but rather hindred.

IV. And where alſo in ſeveral ſtatutes of the noble king of famous memory, king *Edward* IV. made in the two and twentieth year of his reign, and in the third year of the reign of king *Henry* VII. grandfather to our ſaid ſovereign lady the queen's majeſty, and in the ſaid thirty-third year of the reign of our ſaid late ſovereign lord king *Henry* VIII. father to our ſaid ſovereign lady, there is mention made of the prices of bows, which at theſe ſeveral times was appointed to be but three ſhillings and fourpence and not above, to ſell the beſt.

V. At

V. At which ſaid times ſuch bows might well have been ſo ſold to any perſon or perſons according to the rates and prices expreſſed in the ſaid ſeveral acts, until now within this twenty years, the prices of bow-ſtaves have diverſly been raiſed and enhaunced from five pounds a hundred to twelve pounds, or thereabouts; for which cauſes the prices contained in the ſaid ſeveral ſtatutes cannot be obſerved; and yet your majeſty's ſaid ſubjects, the bowyers, are preſently in danger of the ſaid ſeveral ſtatutes concerning the prices of bows, which they humbly beſeeched your majeſty, with the aſſent of your high court of parliament, may be releaſed unto them, and the penalties appointed for the ſame.

VI. It then proceeded to repeal ſo much of the ſtatutes of 22 *Edw.* IV. c. 4. 3 *Hen.* VII. c. 13. and 33 *Hen.* VIII. c. 9. as concerned the prices of bows, and the making of bows of elm, &c. within *London* and *Weſtminſter*, or the ſuburbs of *Southwark*.

VII. It then enacted that every bowyer, within the cities and ſuburbs of *London*, *Weſtminſter*, and *Southwark*, ſhall have fifty bows of elm, witch-haſel, or aſh, upon pain, that for every twenty days he ſhall be without that number, he ſhall for every bow ſhort of it forfeit 10s.

VIII. That if any bowyer ſell any bow, being outlandiſh yew, of the beſt ſort, above the price of 6s 8d, or ſell any bows of the ſecond ſort, above the price of 3s 4d, or ſell any bows of the coarſe ſort called livery bows, above 2s; the ſeller ſhall forfeit for every bow ſo ſold 40s.—and this was to continue until the laſt day of the firſt ſeſſion of the next parliament.

In the 3 *Charles* I. c. 4. A. D. 1627, this act was again continued until the end of the firſt ſeſſion of the next parliament.

In the 16 *Charles* I. c. 4. A. D. 1640, this act was continued from thenceforth, until ſome other act of parliament be made, touching the continuance or diſcontinuance thereof.

After which I find no act to diſcontinue it.

In the 13 of *Eliz.* c. 14. A. D. 1570. the laſt act on this ſubject was paſſed, entitled "An act for the bringing of bow-ſtaves into the realm," which recited as follows:

Whereas

Whereas the uſe of archery not only hath ever been, but alſo yet is, by God's ſpecial gift to the *Engliſh* nation, a ſingular defence of this realm, and an occaſion of many noble victories, and both a very wholeſome exerciſe for the health and ſtrength of men's bodies, and a maintenance of a great number of the queen's true ſubjects and artificers, as bowyers, fletchers, ſtringers, arrow-head-makers, and others of this realm; and for that among other cauſes of the decay of archery, one great cauſe is, the exceſſive price of bow-ſtaves, which groweth principally by the ſcarcity of bow-ſtaves brought into this realm: It therefore enacts that all merchant ſtrangers, uſing to bring wares from the eaſt parts, as well as from the ſeventy-two hans towns, ſhall be bound as the merchants mentioned by the ſtatute 12 *Edw.* IV. c. 2. to bring in bow-ſtaves.

PILLORY.

PILLORY is a *French* word, and it is derived of the *French* word *pilaſtre*, a pillar, *columna*. Et eſt lignea columna, in qua collum inſertum premitur, and thereupon in law it is called *colliſtrigium*, quia in eo collum hominum conſtringitur. This puniſhment is very antient, for the *Saxons* called it *healtrauz*, ſo called for ſtraining the neck. Lord *Coke's* 3 Inſt. 219.

A perſon ſentenced to the pillory, muſt have the ſentence ſtrictly executed upon him, and if the officer gives him any indulgence, he is liable to be puniſhed in a ſummary manner, on application to the Court.

John Shebbeare, was ſentenced by the Court, in November, 1758, to be ſet in and upon the pillory: it appeared that *Beardmore*, who as under ſheriff, was to ſee the ſentence executed, indulged *Shebbeare*, ſo far as not to put him in the pillory, but ſimply to ſtand on the plat-form. The Attorney General therefore, applied for an attachment againſt *Beardmore*, to puniſh him, for a contempt of the Court, in taking upon himſelf to *remit this part of the ſentence*, pronounced upon *Shebbeare*.——The Attorney General produced affidavits, which were very full in aſſerting that *Shebbeare* only ſtood upon the plat-form of the pillory, unconfined and at his eaſe,

eaſe, attended by a ſervant in livery, (which ſervant and livery were hired for this occaſion only,) holding an umbrella over his head, all the time: but his head, hands, neck, and arms were not at all confined, or put into the holes of the pillory; only that he ſometimes put his hands upon the holes of the pillory, in order to reſt himſelf. And it was proved, that Mr. *Beardmore* attended as under-ſheriff, with his wand; and that he treated the criminal with great complaiſance, in taking him to and from the pillory.

On Thurſday, February 8th, 1759, Mr. *Morton*, Mr. Serjeant *Davy*, and Mr. *Howard*, on behalf of Mr. *Beardmore*, produced his affidavit, ſtating, that his officiating at all in this affair, was quite caſual and unexpected, on a ſudden meſſage from his brother under-ſheriff. It was as full and explicit as poſſible, "that he had no ſort of deſign or intention, either directly or indirectly, to favour *Shebbeare*; that he gave no particular direction to his under-officers about it, but meant and intended that this ſentence ſhould be executed in the uſual and ordinary manner, as other ſentences of the like kind were and uſed to be executed; and that he ſtood at a ſhop oppoſite the pillory, during the whole time, without almoſt ever taking his eyes off from it during the whole time, in order to ſee the ſentence properly executed; and that he would have obliged him to ſtand in what he, (Mr. *Beardmore*,) took to be the proper manner, if *Shebbeare*, had offered to withdraw himſelf from ſuch poſition." And he poſitively ſwore "that, according to the beſt information he could get, he looked upon the manner in which *Shebbeare* ſtood, to be the uſual and proper manner of ſtanding, purſuant to rules worded as this rule is: and that he did according to the beſt of his judgment, fully and duly execute the judgment of the Court in the uſual and common manner."

Fourteen or fifteen affidavits were at the ſame time produced, proving that the manner in which *Shebbeare* actually ſtood, was with his hands in and through the ſmall holes, and his head and face fully expoſed through (ſome of them ſaid in and through) the large hole: and that he ſtood ſo, during the whole time, that the ſentence required him to ſtand.

And ſeveral of the deponents (ſheriff's officers, and others) ſwore poſitively, that the ſtanding without confining the head, was the uſual ordinary manner, and had been ſo for thirty or forty years, in *Middleſex*, of criminals ſtanding purſuant to rules of this kind; and that it had been uſual in that county,

county, not to faſten or confine the head in the pillory, for a great many years backwards, and ever ſince one or two perſons who were locked down in the pillory had been killed: and ſeveral of them particularized how much inconvenience might follow from faſtening it down upon the head. And two of the ſheriff's officers ſwore, "That they always deemed and conceived it to be a full execution of the words of the rule, to ſtand as this man ſtood, with the hands in, and the head and face expoſed through the holes of the pillory."

Mr. *Beardmore*, and his counſel admitted (or at leaſt did not pretend to contradict) that his arms were not put through the ſmall holes, and that the pillory was not *ſhut down* upon *Shebbeare*, nor his head abſolutely thruſt through it: which the ſheriff's officers ſwore they did not apprehend to be neceſſary or uſual, unleſs the perſon was refractory. Neither indeed was it pretended, that the upper board of this pillory was at all let down over his neck.

Mr. *Howard* obſerved, (amongſt other things,) that the ſentence of quartering and burning the bowels of traitors is never ſtrictly executed, nor the puniſhment of burning in the hand, which is conſtantly and notoriouſly done in the face and with the knowledge of the judges themſelves, with a cold iron.

Lord Mansfield. If the charge be true, it is admitted that ſuch a diſobedience to the rule of the Court, by their own officer, is puniſhable in this ſummary way.

The fact charged is, "That, by the permiſſion and under the inſpection of the under-ſheriff, the criminal ſtood upright and erect upon the platform of the pillory; and that his head, neck, arms, or hands, were not put through the holes of the pillory; nor his head even inclined to it."

As to the defence which Mr. *Beardmore* has ſet up,—it would have been more judicious to have made no defence at all, than ſuch a one as this. The attempt to juſtify, upon oath, the offender's ſtanding upright, as a legal execution of the ſentence, is an aggravation: it is contrary to every man's conviction; and the form of a pillory alone demonſtrates what is meant by being ſet in as well as upon it. The offender was no more in the pillory, than the footman who ſtood by him.

Then as to the other part of the defence, the uſage—there is not a ſingle inſtance particularized, or ſhewn of this kind; or to prove that there has been ſuch an uſage.

None of his affidavits ſwear, that the method now taken was the uſual and ordinary method; though two of them ſay they conceive it to be a full execution of the rule. They only

only ſay "that it was not uſual or cuſtomary for many years backwards, in *Middleſex*, to faſten or confine the neck in the pillory:" and they give the reaſon of it too, and mention ſome inconveniences of that method.

One of them ſays, that this man ſtood as he had uſually ſeen others do: but he ſpecifies no inſtances. *Revie*, one of the perſons who makes affidavit, ſays he has known this practice about ſetting in the pillory forty years, having lived ſo long near *Charing-Croſs*: and he never ſaw a criminal ſo publicly expoſed in and upon the pillory before, as this man was. To be ſure, the face of a man who ſtands upright, is more expoſed to view, than it would be if his head were bent down and put in the pillory. And therefore, though the words of the affidavit are artfully drawn, to convey another meaning, the mental reſervation of the ſwearer guards him from perjury, ſuppoſing the fact to be that he never ſaw a man ſtand upon the pillory before, in the manner that *Shebbeare* did. So many affidavits, ſo ſtudiouſly and artfully penned, to be ſafely ſworn in one ſenſe and read in another, are an aggravation. And therefore an attachment ought in my opinion, to iſſue againſt him.

Mr. Juſtice *Deniſon* concurred, and obſerved that nothing imports us more, than to ſee that the judgments of the Court be duly executed.

Now no miniſterial officer, or any one that has ſeen a pillory, can doubt about the meaning of ſetting a criminal in the pillory. The very form of the pillory ſhews what it muſt mean. And it cannot be pretended that ſtanding erect upon the pillory, is being ſet in it.

If there had been ſuch an uſage in *Middleſex*, it was high time to put a ſtop to it. But here is no uſage proved.

Mr. Juſtice *Foſter* concurred: and he conſidered this affair, as highly concerning the honour and dignity of the Court, and the effectual execution of juſtice. Mr. *Beardmore* cannot think, nor will he venture to ſay, upon his examination on interrogatories, "that this is the uſual method of putting offenders in the pillory."

Mr. Juſtice *Wilmot* alſo concurred, that the inquiry was a matter of the higheſt importance to the honour of the Court, and the due execution of the ſentences on offenders; and that this offence is of the moſt pernicious tendency; nothing being of worſe conſequence, than that an officer of the Court ſhould combine with a criminal to fruſtrate the ſentence of the Court.

He mentioned a paſſage that occurred to him upon this occaſion, which he remembered to have met with in the year-books,

year-books, and which is quoted in the mayor of *Oxford's* caſe in *Palmer*, 454: where the reaſon given in the record, for the plaintiff's recovering a large ſum in a ſpecial action againſt the defendant, for beating him, being his adverſary's attorney, was "quia the defendant, "*quantum in ſe fuit*, non permiſit regem regnare." And it may be, with at leaſt as much propriety, ſaid of this under ſheriff in the preſent inſtance, "that quantum in ſe fuit, non permiſit regem regnare."

And he expreſsly declared "that, in order to execute the true intent and meaning of this rule, the head and hands ought to be put in and through the pillory, and remain ſo during the whole time."

Mr. *Beardmore*, does not ſwear that he ever ſaw a ſentence executed in this manner: nor do his affidavits ſpecify any inſtance of it. He inquired into the manner of executing the ſentence, only in order to elude it: no man could doubt how it ought to be executed. I think his defence makes his caſe worſe, rather than mends it.

Therefore he was clearly of opinion with his lordſhip and the reſt of his brethren, "that the attachment ſhould iſſue againſt Mr. *Beardmore*."

The whole Court commended Mr. Attorney General for bringing his complaint before them; as the honour and dignity of the Court, and the end and very eſſence of juſtice were ſo materially concerned in the due and regular execution of their ſentences.

The attachment accordingly iſſued.

On the Monday following, (viz. 12th February, 1759,) the defendant appeared, and gave bail, (himſelf in 200l and each of his two ſureties in 100l) to appear and anſwer to interrogatories; and then was ſworn to make true anſwer to ſuch interrogatories as ſhould be exhibited againſt him.

His examination on the interrogatories was much to the ſame effect as his defence on the affidavits.

Mr. Juſtice *Deniſon* pronounced the ſentence.

He firſt expatiated upon the offence. In doing which, he declared, that it was at the ſheriff's peril, to execute the rule of the Court in a proper manner; and that no one could poſſibly doubt that the ſuffering a groſs offender, an infamous libeller of the king and government, to ſtand in triumph, erect upon the pillory, with a ſervant holding an umbrella over his head, inſtead of ſtanding with his head in the pillory, by way of diſgrace and *ludibrium*, (which is the intent of this kind of puniſhment), was a highly improper

per and insufficient manner of executing this rule of the Court.

He then gave the sentence upon the defendant *Beardmore*, for this his contempt; viz. To pay a fine of 30l and to be * committed to custody for two months, and till the fine shall be paid. The king against *Beardmore*, (under sheriff of *Middlesex*). *King's Bench*, 2 *Burrow's* Reports, 792. Nov. 1759.

SEDUCTION.

NO contract or obligation is good, if founded on an immoral consideration: the following case affords an instance of this nature, and contains a species of information which may be of much importance to young women who are exposed to unprincipled designs under colour of engagements, which in point of law are not binding.

William Perkins, and *Mary Walker*, having contracted a love and value for each other, had agreed to live together, on the following terms; that he should find her with board, lodging, cloaths, and a servant to attend her; and if he happened to die in her life-time, or should refuse to live with her, he or his representatives should pay her an annuity of 60l per annum, and that, if she left him, or kept company with any other man, he should not be obliged to pay her the annuity, or to find her in board. *Perkins* bound himself in a bond to perform this agreement—*Mary Walker* survived *Perkins*: after his death, his administrator, (i. e. the representative who is appointed, to distribute the estate and effects of the person who dies without a will,) refused to pay this annuity; whereupon she brought this action against him. He pleaded, that this bond was given for an unlawful consideration, that of living together in a state of fornication; and was therefore void in law. *Mary Walker*, replied that she, being a virgin, was seduced by *Perkins*; and that, for making a provision for her, and as a compensation for her chastity, he gave her the bond, and that therefore she was entitled to the annuity.

Wedderburne,

* He was still under sheriff at this time.

Wedderburne, for *Perkins's* adminiſtrator inſiſted, that, on the face of the bond, it appeared to be an illegal conſideration, and therefore the bond was void.

Blackſtone, for the plantiff, *Mary Walker*, argued, that the ſetting aſide ſuch bonds was as much an encouragement to ſeduction, in one ſex, as eſtabliſhing them would be, to incontinence, in the other: and, that ſeduction is the more odious crime. That the condition in the bond was two-fold; 1. To engage her to live on with him in a ſtate of debauchery, which is clearly immoral; and therefore contrary to law. 2. To make a proviſion for her; in caſe of his death; which, as ſhe was debauched by *Perkins*, is clearly a good conſideration, within the caſes of lady *Annandale*, 2 *P. Wms.* 432, *Cray and Rooke*, *Forreſter*, 153, &c. That, if a bond be conditioned to perform two things, one contrary to law, and the other conſiſtent with law; the bond ſhall be good as to the latter, and only void as to the former.

That, if the bond had been put in ſuit by *Perkins* againſt *Mary*, for not continuing to live with him, *Perkins* could not have recovered; but being now ſued on the virtuous part of the contract, to recover a maintenance after *Perkins's* death, it was legal.

But by the Court, the conſequences drawn would be juſt, did not the foundation fail in point of fact; here is no virtuous part in the contract, all is calculated for the purpoſes of proſtitution: inſtead of *premium pudicitiæ*, this is *pretium impudicitiæ*. *Walker v Perkins*, 1 *Black. Reports*, 567. A.D. 1764.

From the whole it appears, that if a man enter into an obligation to pay money to a young woman to induce her to comply with his deſires and to live with him as a miſtreſs, this obligation is void, and although the woman ſubmit to the terms, and become a miſtreſs to him, yet ſhe will not be able to recover the money; becauſe the obligation is founded on an immoral conſideration which the law will not tolerate: but on the other hand, if after cohabiting with a woman, he enter into an obligation to pay her money, as a compenſation for what is paſt, and not as an inducement to her living in future with him in that ſtate; then ſuch obligation is good; and the money may be recovered.

AUCTIONS.

AUCTIONS.

BEXWELL the plaintiff ſent a horſe to *Chriſtie* the auctioneer to be ſold, with a written order not to let the horſe go under 15l. Notwithſtanding theſe directions, *Chriſtie*, (at an auction purporting to be "a ſale of goods and effects of a gentleman deceaſed, by order of the executor") ſold the horſe to the beſt bidder, for 6l 16s 6d. *Bexwell* brought this action againſt *Chriſtie*, to recover the difference, and the queſtion for the opinion of the Court was this, viz. Whether under the circumſtances of this caſe, the auctioneer was bound to bid for and buy the horſe, if no one bid to the amount of 15l for it?

When this queſtion came to be argued before the Court, *Lord Mansfield* obſerved that the practice at auctions of owners buying in their own goods, ſtruck him as a fraud upon the public; and that the nature of theſe ſales required the goods ſhould go to the beſt *real* bidder.

Mr. *Mansfield* and Mr. *Morgan*, for the plaintiff *Bexwell*, inſiſted, that the defendant ought to have obeyed his inſtructions, and not have let the horſe go under the 15l; that by taking the horſe from the plaintiff's ſervant and putting him up to auction, he had engaged not to ſell it for leſs than 15l; and therefore his doing ſo was a fraud upon the plaintiff, who would not have left the horſe with the defendant, much leſs have had it put up to ſale at all, if he had not underſtood the defendant meant to comply with his directions, and that it was legal for him ſo to do; that this was the practice at all auctions; conſequently, if an univerſal practice, could be no fraud on any body. But in fact, this was no more than a direction to ſet the horſe up at that price, and that there ſhould be no bidding under.

Mr. *Wallace* and Mr. *Dunning* for the defendant, inſiſted that it would have been a fraud upon the ſale, if the auctioneer had bid or provided a bidder to puff this particular lot, or any other lot in the ſale; and therefore, the action could not be maintained.

Lord *Mansfield*. The matter in queſtion is in itſelf of ſmall value; but in reſpect of the principles by which it muſt be governed, it is a queſtion of great importance. Since

the trial I have mooted the point with many who are not lawyers, upon the morality and rectitude of the tranſaction. The queſtion is, whether a bidding by the owner of goods at a ſale under theſe conditions, namely, "that the higheſt bidder ſhall be the purchaſer, and if a diſpute ariſe, to be decided by a majority of the perſons preſent," is a bidding within the meaning of ſuch conditions of ſale? There is no expreſs undertaking on the part of the defendant, nor is it, as has been ingeniouſly ſaid, a direction that there ſhould be no bidding under 15l which might be fair: but the direction given to the defendant is, "not to let the horſe go under 15l;" which implies there might be a bidding under that ſum. The queſtion then is, whether the owner can *privately* employ another perſon to bid for him.—The baſis of all dealings ought to be good faith; ſo, more eſpecially in theſe tranſactions, where the public are brought together upon a confidence that the articles ſet up to ſale will be diſpoſed of to the higheſt real bidder: that could never be the caſe, if the owner might ſecretly and privately inhance the price, by a perſon employed for that purpoſe; yet tricks and practices of this kind daily increaſe, and grow ſo frequent, that good men give into the ways of the bad and diſhoneſt in their own defence. But ſuch a practice was never openly avowed. An owner of goods ſet up to ſale at an auction, never yet bid in the room for himſelf. If ſuch a practice were allowed, no one would bid. It is a fraud upon the ſale, and upon the publick. The diſallowing it is no hardſhip upon the owner. For if he is unwilling his goods ſhould go at an under price, he may order them to be ſet up at his own price, and not lower: ſuch a direction would be fair: or he might do as was done by lord *Aſhburnham*, who ſold a large eſtate by auction; he had inſerted in the conditions of ſale, that he himſelf might bid once in the courſe of the ſale: and he bid at once 15 or 20,000l. ſuch a condition is fair; becauſe the public are then appriſed, and know upon what terms they bid. In *Holland* it is the practice to bid downwards[a]. The queſtion then is, is ſuch a bidding fair? if not, it is no argument to ſay it is a frequent cuſtom: gaming, ſtock-jobbing, and ſwindling are frequent. But the law forbids them all. Suppoſe there was an agreement to abate ſo much; which

[a] This practice is as follows; an article is ſet up at any price the auctioneer pleaſes; if nobody bids, he lowers the price, and thus continues lowering, until ſome perſon cries out *mine*, and that perſon who *firſt* claims it at the laſt price mentioned by the auctioneer, is entitled to it. A practice congenial to Dutch taciturnity.

which is the caſe where goods are ſold by one perſon in the trade to another: they abate ſometimes 10 or 15 *per cent.* Such an agreement between the owner and the bidder, at a ſale by auction, would be a groſs fraud. What is the nature of a ſale by auction? It is, that the goods ſhall go to the higheſt real bidder. But there would be an end of that, if the owner might privately bid upon his own goods. There is no contract with the auctioneer. He is only an agent between the buyer and ſeller. He may fairly bid for a third perſon who employs him, but not for the owner.

In this caſe, there is another fraud put upon the public. For by the catalogue, the goods are deſcribed to be "the goods of a gentleman deceaſed, and ſold by order of the executor." Upon this repreſentation, many people would attend to bid, on a ſuppoſition, that the goods were neceſſarily to be ſold at all events, whether valuable or not valuable; whereas they might have their ſuſpicions if they were the property of perſons living. Horſes, or any other ſpecies of property, belonging to perſons that are dead, are not ſo likely to be faulty, as thoſe which are parted with by perſons in their life-time.

We all remember the ſale of a gentleman's wines, (*Bradſhaw*'s), where vaſt quantities had been ſent in belonging to other perſons: and all ſold at a very high price, under an idea they were his. The conſequence was, moſt of the buyers were taken in. Therefore, upon full conſideration, I am of opinion, that a bidding for the owner in the manner contended for; and agreeable to the direction given in this caſe, would have been a fraud upon the ſale: and conſequently, that his action againſt the defendant as auctioneer, cannot be maintained. The other judges, viz. *Aſton*, *Willes*, and *Aſhurſt*, were of the ſame opinion. *Bexwell againſt Chriſtie*, *King's Bench*, *Cowper's Reports*, 395, 3 *Feb.* 1776.

On the whole therefore it appears, that an action does not lie againſt an auctioneer, for ſelling an article at the higheſt price bid for it, contrary to the owner's expreſs directions, not to let it go under a larger ſum named; but that the action would lie, had the owner directed the auctioneer to ſet the article up at ſuch a price and not lower.

ROBBERY.

IN order to conſtitute the crime of robbery, three things are requiſite: 1. There muſt be a felonious intent. 2. There muſt be a taking, but it is immaterial of what value the thing taken is, a penny, as well as a pound, forcibly extorted, makes a robbery: 3. There muſt be previous violence, or putting in fear. On this laſt requiſite, a queſtion aroſe in the following caſe: whether to obtain money by threatening to charge a perſon with an unnatural crime[a], and who parted with his money in conſequence of being alarmed at the perſonal danger that might follow ſuch a charge, was in point of law ſuch a putting in fear, as to amount to the offence of robbery.

On the 18th of January, 1779, the proſecutor Mr. *Charles Fielding*, dined at Mrs. *Cotton*'s in *Harley-ſtreet, Cavendiſh-ſquare*. As he was returning through *Soho-ſquare*, towards the *Play Houſe*, between the hours of ſix and ſeven o'clock in the

[a] This infamous crime againſt nature committed either with man or beaſt, is a crime which ought to be ſtrictly and impartially proved, and then as ſtrictly and impartially puniſhed. But it is an offence of ſo dark a nature, ſo eaſily charged, and the negative ſo difficult to be proved, that the accuſation ſhould be clearly made out: for if falſe, it deſerves a puniſhment inferior only to that of the crime itſelf. I will not act ſo diſagreeable a part to my readers as well as myſelf, to dwell any longer upon a ſubject, the very mention of which is a diſgrace to human nature. It will be more eligible to imitate in this reſpect the delicacy of our *Engliſh* law, which treats it, in its very indictments, as a crime not fit to be named; "peccatum illud horribile, inter chriſtianos non nominandum." As to the puniſhment of this crime, the voice of nature and of reaſon, and the expreſs law of God (Lev. xx. 13. 15.) determine it to be capital. Of which we have a ſignal inſtance, long before the *Jewiſh* diſpenſation, by the deſtruction of two cities by fire from heaven, ſo that this is an univerſal, not merely a provincial precept. And our antient law in ſome degree imitated this puniſhment, by commanding ſuch miſcreants to be burnt to death: though *Fleta* ſays, they ſhould be buried alive: either of which puniſhments was indifferently uſed for this crime among the ancient Goths. But now the general puniſhment of all felonies is the ſame, viz. by hanging; and this offence, being in the time of popery, ſubject only to eccleſiaſtical cenſures, was made felony without benefit of clergy, by ſtat. 25 Hen. VIII. c. 6. reviſed and confirmed by 5 Eliz. c. 17. And the rule of law herein is, that if both are arrived at years of diſcretion, "agentes et conſentientes pari pœna plectantur." 4 *Black. Com.* 215.

the evening; he met the priſoner *Donnally*, whom he had never ſeen before. *Donally* deſired that Mr. *Fielding* would give him a preſent. Mr. *Fielding* aſked, "For what?" *Donally* anſwered, "You had better comply, or I will take you before a magiſtrate, and accuſe you of an attempt to commit an unnatural crime."

Mr. *Fielding* then gave him half a guinea, which the priſoner ſaid was not ſufficient; but Mr. *Fielding* had no more in his pocket.—On the 20th of January, about four o'clock in the evening, Mr. *Fielding* met with the priſoner *Donally* again in *Oxford-ſtreet*, who made uſe of the ſame threats as before; he ſaid, Mr. *Fielding* knew what paſſed in *Soho-ſquare*; and unleſs he would give him more money, he would take him before a magiſtrate, and accuſe him of the ſame attempt, and that it would go hard againſt him unleſs he could prove an *alibi*[a]. Mr. *Fielding* then went to the ſhop of Mr. *Walter*, a grocer in *Old-Bond-ſtreet*. The priſoner followed him, and ſtaid on the outſide of the door. When Mr. *Fielding* went into the ſhop, he took a guinea out of his pocket, and gave it to Mr. *Walter*, and deſired he would give it to the man at the door; which Mr. *Fielding* ſaw him do, and then the priſoner went away. Mr. *Fielding* ſaid he was exceedingly alarmed at both the times, and under that alarm gave the money. He was not aware what were the conſequences of ſuch a charge, and he apprehended it might coſt him his life.

The Jury were deſired to conſider, firſt, whether they were ſatisfied that Mr. *Fielding* delivered his money through fear, and under an apprehenſion that his life was in danger? Secondly, if they did not think that Mr. *Fielding*, apprehended his life was in danger, whether the money was not obtained by means of the priſoner's threats, and againſt the will of Mr. *Fielding*.

The Jury found him guilty; and ſaid they were ſatisfied that Mr. *Fielding* delivered his money through fear, and under an apprehenſion that his life was in danger.

The queſtion is, whether this amounts in law to a robbery?

On the 29th of April following, the twelve Judges aſſembled at Lord Chief Juſtice *De Grey's* houſe in *Lincoln's Inn Fields*, for the purpoſe of hearing counſel upon this caſe. It was argued by Mr. *Howarth*, for the crown, and by Mr. *Graham* for the priſoner. The Counſel for the crown ſpoke firſt,

[a] That he was ſomewhere elſe, at the time the offence is charged to be committed.

firſt, and afterwards replied to the arguments by the counſel for the priſoner. The counſel then withdrew, and the Judges debated the point among themſelves, and then gave their ſeveral opinions, beginning with the junior Judge.

At the enſuing May ſeſſion at the *Old Bailey*, Mr. Juſtice *Willes*, delivered the reſult of the deliberations to the following effect.

The queſtion ſubmitted to the Judges was, "Whether this offence amounts to a robbery?" this queſtion has been argued by counſel both for the priſoner and for the crown. The twelve Judges have inveſtigated the ſubject, and delivered their ſentiments *ſeriatim*; and they are unanimouſly of opinion, that the priſoner at the bar is guilty of the crime of which he has been convicted.

The grounds and principles upon which this determination hasbeen formed, I ſhall endeavour to ſtate to the Court with equal brevity and perſpicuity.

The definition of robbery, as it is given by Sir *William Staundforde*, Sir *Mathew Hale*, and Mr. Serjeant *Hawkins*, is "a felonious and violent taking of any money or goods from the perſon of another, putting him in fear," from which it is evident, that to conſtitute the crime of robbery, three ingredients are neceſſary; firſt, a felonious intention, or *animus furandi*: ſecondly, ſome degree of violence, or putting in fear: thirdly, a taking from the perſon of another. But as the Judges declared, they did not mean to draw the exact line what ſhould, or what ſhould not be conſtrued a robbery, but that every caſe muſt depend on its own particular circumſtances, it will be ſufficient for me to ſhew that the facts proved in the preſent caſe, are within the definition of that offence.

Firſt, the felonious intention or *animus furandi*.

The priſoner, a ſtranger to Mr. *Fielding*, ſtops him in the ſtreet during the duſk of the evening, and deſires, That he would give him a preſent; and when he is aſked, for what? he replies, You had better comply, or I will take you before a magiſtrate, and accuſe you of an attempt to commit an unnatural crime. This conduct will not bear two conſtructions. It is clear that he laid in the way for the purpoſe of obtaining money, againſt the will of Mr. *Fielding*; and wherever one man obtains property from the poſſeſſion of another againſt his will, the law preſumes the act to proceed from a felonious intention, unleſs the circumſtances under which it was done evince the contrary; for the ſecurity of private property is the care of the law, and the preſumptions which it raiſes to attain that end, cannot be repelled

pelled by even a ſpecious pretence of right; much leſs in the preſent caſe, where the baſeneſs of the deſign is apparent. Nor will the law ſuffer its object to be evaded by an ambiguity of expreſſion; for if a man *animo furandi* ſays, "give me your money—lend me your money—make me a preſent of your money," or words of the like import, they are equivalent to the moſt poſitive order or demand; and if any thing be obtained in conſequence, it will form the firſt ingredient in the crime of robbery.

The ſecond point conſidered was, whether the priſoner had uſed that degree of violence, or inſpired that degree of fear, which the law holds neceſſary to conſtitute this offence. In the definition above mentioned, theſe two words are included as deſcriptive of the cauſe and effect; but the law does not in this caſe require an actual violence upon the perſon, or an exiſting fear in the mind. A man with a cutlaſs under his arm, or a piſtol in his hand, demands and obtains the money of another without touching his perſon. Here no actual violence is uſed. Suppoſe, ſays Mr. Juſtice *Foſter*, p. 128. "the true man is knocked down, without any previous warning to awaken his fears, and lieth totally inſenſible while the thief rifles his pockets; where is the circumſtance of exiſting fear?" and yet in both theſe caſes the crime would be robbery. The putting in fear need not be laid in an indictment for this offence, nor the act of fear, proved upon the trial; but if it be laid to be done violently and againſt the will, the law in *odium ſpoliatoris* will preſume it. It is not even neceſſary that there ſhould be an actual danger; for a robbery may be committed without uſing an offenſive weapon; as by uſing a tinder box, or a candleſtick inſtead of a piſtol. A reaſonable fear of danger cauſed by the exerciſe of a conſtructive violence, is ſufficient; and where ſuch a terror is impreſſed upon the mind, as does not leave the party a free agent, and in order to get rid of that terror he delivers his money, he may clearly be ſaid to part with it againſt his will. Nor need the degree of conſtructive violence be ſuch, as in its effects neceſſarily imports a probable injury; for when a villain comes and demands money, no one knows how far he will go; and, if the fact be attended with theſe circumſtances of terror and violence, which in common experience are likely to induce a man to part with his property, for the ſafety of his perſon, it is all the law requires. Sir *Mathew Hale*, 532, cites a caſe from the year-books of *Edward* III. which carried this doctrine ſtill farther. If thieves come to rob a man, and finding little about him, enforce him by menace of death to ſwear on a book

book to fetch them a greater ſum, which he doth accordingly, this is a taking by robbery: and yet, when he fetches the money, he is removed from all terror but the fear of breaking his oath, and is out of the reach of violence.

But let us ſee how far the circumſtances which attended the fact in the preſent caſe, will bring it within theſe rules of law. A young gentleman from ſchool is accoſted at night in *London* ſtreets, by a perſon he never ſaw before, whom he muſt ſuſpect to be a villain. The ſtranger demands a preſent. This conduct ſeems ſufficient to ſatisfy the legal idea of robbery. But the priſoner goes further, and ſays, "you had better comply, or I will take you before a magiſtrate." This is a threat of perſonal violence, for the proſecutor had every thing to fear, in being dragged through the ſtreets as a culprit charged with an unnatural crime. The threat muſt neceſſarily and unavoidably impart intimidatien. It is equivalent to actual violence, for no violence that can be offered, could excite a greater terror in the mind, or make a man ſooner part with his money. The menace is much ſtronger than that in *Harman*'s caſe, 1. *Hale*, 534, and it is implied that if the violence, in that caſe, had preceded the theft, it would have been robbery. What can operate more powerfully on the mind than a menace to do that, which in its conſequences would blaſt the faireſt fame, and ruin for ever the brighteſt character? It is much more likely that ſuch a menace ſhould occaſion fear, than thoſe which Mr. Serjeant *Hawkins* has mentioned in his pleas of the crown. It is however ſufficient to implant a reaſonable fear of danger which might operate *in conſtantem virum*, as well as in *meticuloſum*, much more on the mind of a boy come from ſchool for the holidays. It was agreed by the priſoner's counſel that this was a fraudulent extorting, and not a taking by violence; as in burglary, where the breaking is a neceſſary ingredient: and yet if a perſon fraudulently get admiſſion into a houſe by colour of law, or under pretence of taking lodgings, or of having buſineſs, it has frequently been held ſufficient proof of a conſtructive breaking. Several of the judges thought there was a great analogy between theſe caſes and the preſent, and therefore, that it ought to be governed by the like principles. There is no actual breaking in thoſe caſes of burglary; there is no actual violence in the preſent caſe; yet the fraud uſed in both, amounts to a conſtructive breaking in one caſe, and to a conſtructive violence in the other; but the determination did not turn entirely upon this argument.

As

As to the third ingredient, *viz.* a taking from the perſon, the Judges were of opinion, that ingenuity could not raiſe a doubt upon the point.

But before I conclude, it may be proper to ſtate the ſeveral authorities which ſupport this determination of the Judges. The firſt caſe was that of *James Brown*, who was tried and convicted at the *Old Bailey*, in October, 1763, for a highway robbery on *Ralph Hudſon*; and he was executed. The ſecond caſe was that of *Thomas Jones*, tried and convicted before Mr. Baron *Hotham*, in February ſeſſion, 1776; and his caſe was determined to be robbery by all the Judges at *Serjeant's-Inn-Hall*; and he was executed.

The third caſe was that of *Robert Harrold*, in laſt June ſeſſion, who was tried, and convicted of the like charge; but he was afterwards reprieved upon ſome doubt on the evidence. In all theſe three caſes there was this difference from the preſent caſe, that ſome actual violence was proved, as taking and ſeizing by the arm or collar. But the Judges all held this did not make any material diſtinction; but that ſufficient was proved in this caſe for the Jury to find the priſoner *Donally*, guilty of robbery. *Leach's Crown Law*, 176. A. D. 1779.

In the preceding caſe, it appeared that the perſon robbed was in apprehenſion of perſonal danger in conſequence of the charge of an unnatural attempt: but in the following caſe, there was no apprehenſion of that nature, but he only parted with his money to guard againſt the imputation on his character.

The priſoner *Daniel Hickman*, was tried before Mr. Juſtice *Buller*, at the *Old Bailey* in July ſeſſion, 1783, for a robbery upon *John Miller*.

The proſecutor *Miller*, was ſervant to Mr. *Lewis*, table-decker to the chaplains room in *St. James's Palace*, and had an apartment there, in which he alone ſlept, which apartment was ſituated in a court, called "the board of green cloth." The priſoner was a centinel on guard at the palace, and had one night been treated by the proſecutor with ſome bread and cheeſe and ale in this room. About a fortnight afterwards, very late in the evening of the day, laid in the indictment, the proſecutor, on going up ſtairs, heard ſome body ſtepping very cloſely behind him. On turning round, he diſcovered that it was the priſoner, who ſaid, "It is me."

The profecutor replied, "What brought you here at this time of the night?" the priſoner anſwered, "I am come for ſatisfaction; you know what paſſed the other night; you are a Sodomite; and if you do not give me ſatisfaction, I will go and fetch a ſerjeant and a file of men, and take you before a Juſtice; for I have been in the black-hole ever ſince I was here laſt, and I do not value my life." The profecutor aſked him what money he muſt have? the priſoner ſaid, "I muſt have three or four guineas." The profecutor then gave him two guineas, which was all he had, and promiſed to give him another guinea the next morning. The priſoner took the two guineas, ſaying, "Mind, I don't demand any thing of you." The next morning he came again, and received the other guinea; and in a few days after, upon making an application for more money upon the ſame pretence, he was apprehended. The profecutor ſwore, that he was very much alarmed when he gave him the two guineas, and did not very well know what he did; but he parted with his money under an idea of preſerving his character from reproach, and not from the fear of perſonal violence.

The learned Judge ſtated to the Jury, the uſual ingredients which the law required to conſtitute the crime of robbery; and particularly as applicable to this ſpecies of it, the determination of the Judges in the caſe of *the king*, *v. Donnally*; remarking the difference, that in *Donnally's* caſe, the profecutor had ſworn, that he delivered his money under an apprehenſion of perſonal danger, as well as from the fear of loſing his character; but that, in the preſent caſe, the profecutor had ſworn he parted with his money for the ſake of his character only, and not from any apprehenſion of danger to his perſon.

The Jury found the priſoner guilty, and alſo that the profecutor parted with his money againſt his will, through a fear that his character might receive an injury from the priſoner's accuſation.

This caſe, however, being only the ſecond of the kind, and ſome doubt having prevailed with reſpect to *Donnally's* caſe, becauſe he was not executed, the judgment was reſpited, and the caſe ſubmitted to the conſideration of the twelve Judges, upon the difference before-mentioned between the two caſes.

In February ſeſſions, 1784, the priſoner was called to the bar; and Mr. Juſtice *Aſhurſt*, delivered the opinion of the Judges to the following effect.——Some doubts having been entertained, as to the opinion of the twelve Judges in the caſe of *Patrick Donnally*, the learned Judge who tried the priſoner,

priſoner, thought it proper, that the preſent caſe ſhould likewiſe be referred to their conſideration. They have accordingly conferred upon it; and they are of opinion, that it does not materially differ from the caſe of *Donnally*, for that the true definition of robbery is the ſtealing, or taking from the perſon, privately, or in the preſence of another, property of any amount, with ſuch a degree of force or terror, as to induce the party unwillingly to part with his property; and whether the terror ariſes from real or expected violence to the perſon, or from a ſenſe of injury to the character, the law makes no kind of difference; for to moſt men the idea of loſing their fame and reputation is equally, if not more terrific than the dread of perſonal injury. The principal ingredient in robbery is a man's being forced to part with his property; and the Judges are unanimouſly of opinion, that upon the principles of law, and the authority of former deciſions, a threat to accuſe a man of having committed the greateſt of all crimes, is as in the preſent caſe, a ſufficient force to conſtitute the crime of robbery by putting in fear.

The priſoner received ſentence of death, and was executed, *Leach's Crown Law*, 231. A. D. 1783.

A caſe of this kind happened ſo lately as November, 1792.

Philip Davis a *Dutchman*, was proſecuted for a robbery on *Edward Peterſon*, on the 15th September, and tried before Mr. Juſtice *Heath*, at the *Old Bailey*, the circumſtances as they appeared from the evidence of the proſecutor *Peterſon*, were as follow:

On Saturday night, the 15th of September, as the proſecutor was paſſing into *Cheapſide* from *St. Paul's Church-yard*, he perceived the priſoner; that afterwards he perceived him again in *Friday-ſtreet*. The proſecutor had occaſion to call at the *Saracen's Head* to enquire after a gentleman, and not finding him there, he did not ſtop. When he came out, he perceived no perſon in the ſtreet, till he had got to ſome diſtance, when he again ſaw the priſoner, who came up to him and behaved in an indecent manner. He told the proſecutor he was a man in great diſtreſs, and that he muſt have ſome money from him. The priſoner threatened the proſecutor that he would accuſe him of an unnatural crime, and expoſe him to the mob, unleſs he would give him two guineas. He followed the proſecutor from ſtreet to ſtreet,

continuing

continuing theſe threats, till they came near the *Butler's Head*, which is kept by Mr. *Baldwin*. The priſoner at laſt told him he would take a guinea and a half. The proſecutor had only half a guinea and ſome ſilver in his pocket, and went into the *Butler's Head* and borrowed a guinea of Mr. *Baldwin*, whom he knew, and gave it to the priſoner. The proſecutor ſaid he did not give this money to the priſoner from any conſideration of diſtreſs or charity, but from fear of the accuſation which was threatened to be brought againſt him. When the priſoner got this money, he went away apparently ſatisfied. The proſecutor continued in the coffee room, and in about half an hour after the priſoner returned with another man, and ſaid he wiſhed to ſpeak with the proſecutor. When Mr. *Peterſon* came to the door, the priſoner ſaid he was ſorry for what he had done, and the other man ſpoke a few words in a low tone of voice, which the proſecutor did not underſtand. He told them they were two villains, and deſired them to go about their buſineſs.

Apprehenſive the priſoner might call upon him again, the proſecutor informed his friends what had happened to him, and they all agreed to dine together the next day at the *Butler's Head*. About five o'clock at night, the priſoner called at the *Butler's Head*, and ſaid he wiſhed to ſpeak privately with Mr. *Peters* (as he called him). He was deſired to walk in, which he refuſed to do, ſaying he wiſhed to ſpeak with Mr. *Peters* by himſelf. The proſecutor deſired that he would go up ſtairs and explain in the preſence of his friends, his conduct to him laſt night.

The priſoner was unwilling, and ſaid he wiſhed to ſpeak with the proſecutor privately. He was told he had ſpoken before with him privately, and that he muſt ſpeak with him in the preſence of his friends. They inſiſted that he ſhould go up ſtairs. The moment he entered the room he begged for mercy. He then took a guinea, half a-crown, and a ſhilling, out of his pocket, and put it on the table. He ſaid that was all that remained of the guinea and a-half which he had received of Mr. *Peterſon*, but that he was willing to leave his coat.

One of the proſecutor's friends ordered him to get upon his knees, and to anſwer him any queſtions he might put to him. The priſoner went upon his knees, and on being aſked whether there was the leaſt foundation for the accuſation which he threatened to bring againſt the proſecutor? he anſwered, No; but that he was a man in great diſtreſs, and thought that was a mode by which he could obtain money. A Conſtable was ſent for, and he was taken before a magiſtrate.

The

This evidence of Mr. *Peterſon's* was fully confirmed by three or four reſpectable witneſſes who were preſent at the time when the priſoner was taken into a room up ſtairs.

The learned Judge, in his charge to the Jury, obſerved, that a more formidable charge could not be made by one man againſt another. It was enough to have alarmed a man even of ſtronger nerves than the proſecutor. It was no leſs than accuſing a man of an unnatural crime, not in the courſe of juſtice, where a man might have the means of defending himſelf, and where he might ſhew by witneſſes the improbability of the ſtory; but he threatened to charge him in ſuch a manner as greatly to have endangered his life. For if the priſoner had accuſed the proſecutor to the mob of an unnatural attempt on him, they might have ſeized him, without liſtening to any defence he might have had to make. It had been proved by the witneſſes, that the proſecutor was under great agitation of mind. If the proſecutor had ſeized the priſoner, when he threatened him with this accuſation, he might have raiſed the mob upon him, and the conſequences might have been dreadful. And therefore the proſecutor could not be accuſed of having acted with great timidity.

The priſoner ſaid he had been in the country 15 months, and a woman with whom he had lodged for the laſt four months gave him a character for honeſty and ſobriety.

The Jury immediately found the priſoner GUILTY.

The learned Judge ſaid the public were extremely obliged to the proſecutor for bringing forward this charge, and his lordſhip hoped that if any other gentleman was attacked in a ſimilar manner, that he would diſplay the ſame degree of fortitude in the ſame public manner. Seſſions *Old Bailey*, Nov. 1792.

LIBELS.

BY the following caſe it appears, that an obſcene book is puniſhable, as a libel: and when we reflect on the loads of ſuch traſh daily iſſuing from the preſs, and depraving the morals of the people, we cannot avoid wiſhing that proſecutions for this offence might be more frequent.

An information, was exhibited by the Attorney General, againſt the defendant *Edmund Curl*, for that he contriving and intending

intending to injure the morals of the people of this realm, printed and publiſhed a certain wicked and obſcene book entitled *Venus in the Cloyſter*, or, *the Nun in her Smock* (and then ſet out the lewd paſſages). The defendant was found guilty. And in Trinity term laſt, it was moved in arreſt of judgment, by Mr. *Marſh*, that however the defendant may be puniſhable for this in the Spiritual Court, as an offence *contra bonos mores*, yet it can't be a libel for which he is puniſhable in the Temporal Court. *Libellus* is a diminutive of the word *liber*, and 'tis *libellus* from its being a book, and not from the matter of it's contents. In the caſe *de libellis famoſis*, my lord *Coke* ſays, that it muſt be againſt the publick, or ſome private perſon, to be a libel; and I don't remember ever to have heard this opinion contradicted. Whatever tends to corrupt the morals of the people; ought to be cenſured in the Spiritual Courts, to which properly all ſuch cauſes belong; what their proceedings are I am a ſtranger to; but for me 'tis ſufficient to ſay, I don't find any caſe wherein they were ever prohibited in ſuch a cauſe: in the reign of king *Charles* II. there was a filthy run of obſcene writings, for which we meet with no proſecution in the temporal courts; and ſince theſe were things not fit to go unpuniſhed, it is to be ſuppoſed that my Lords the Biſhops, animadverted upon them in their courts. In the caſe of the *Queen, v. Read*, 6 *Ann.* in B. R.[a] there was an information for a libel in writing an obſcene book, called, "The fifteen plagues of a maidenhead," and after conviction it was moved in arreſt of judgment, that this was not puniſhable in the temporal courts, and the opinion of the Chief Juſtice *Holt*, was ſo ſtrong with the objection, that the proſecutor never thought fit to ſtir it again.

Mr. Attorney General, *contra*, I do not obſerve it is pretended there is any other way of puniſhing the defendant; for if the ſpiritual court had done it, inſtances might be given; and it is no argument to ſay we meet with no prohibitions; ſuch a way of arguing would conſtrue them into all ſorts of juriſdictions.

What I muſt inſiſt upon is, that this is an offence at common law, as it tends to corrupt the morals of the king's ſubjects, and is againſt the peace of the king. Peace includes good order and government, and that peace may be broken in many inſtances without an actual force. 1. If it be an act againſt the conſtitution or civil government; 2. If it be againſt religion: and, 3. If againſt morality.

1. Under

[a] B. R. *Banco Regis*, Court of King's Bench.

1. Under the firſt head, fall all the caſes of ſeditious words or writings. 2 *Roll. Abr.* 78. *pl.* 2. 1 *Vent.* 324. 3 *Keb.* 841, and the caſe of the *Queen v. Bedford, Mich.* 12. *Ann.* whoſe treatiſe of hereditary right was held to be a libel, though it contained no reflection upon any part of the then government.

2. It is a libel if it reflects upon religion, that great baſis of civil government and ſociety, and it may be both a ſpiritual and temporal offence. *Cro. Jac.* 421. 2 *Roll. Abr.* 78. *pl.* 2. 1 *Vent.* 293. 3 *Keb.* 607, 621. In *Tremayne's Entries*, 226. there is a ſentence to have a paper fixed over the defendant's head; intimating that he had uttered blaſphemous words tending to the ſubverſion of government. There is one *Hall*, now in cuſtody, on a conviction as for a libel intitled, "A ſober reply to the merry arguments about the Trinity, and *Paſch.* 10 *Ann. Regina v. Clenden*, there was a ſpecial verdict on a libel about the Trinity, and it was not made a doubt of in that caſe.

3. As to morality, deſtroying that is deſtroying the peace of the government, for government is no more than public order, which is morality. My Lord Chief Juſtice *Hale* uſed to ſay, chriſtianity is part of the law, and why not morality too? I do not inſiſt that every immoral act is indictable, ſuch as telling a lie, or the like; but if it is deſtructive of morality in general, if it does, or may, affect all the king's ſubjects, it then is an offence of a public nature. And upon this diſtinction it is, that particular acts of fornication are not puniſhable in the temporal courts, and bawdy-houſes are. In Sir *Charles Sedley*'s caſe it was ſaid, that this court is the *cuſtos morum* of the king's ſubjects. 1 *Sid.* 168. And upon this foundation there have been many proſecutions againſt the players for obſcene plays, though they have had intereſt enough to get the proceeding ſtayed before judgment. *Tremayne*'s *Ent.* 209, 213, 214, 215, 3 vol. *State Trials*, lord *Grey's* caſe.

Mich 10, *W.* III. *Rex. v. Hill*, the defendant was indicted for printing ſome obſcene poems of my lord *Rocheſter*'s, tending to the corruption of youth; upon which he went abroad, and was outlawed; which he would not have done if his counſel had thought it no libel.

The ſpiritual courts puniſh only perſonal ſpiritual defamation by words; if it is reduced to writing, it is a temporal offence *Salk.* 552. *Mo.* 627. and it is puniſhable as a libel. My

lord

lord *Coke*, in the caſe *de libellis famoſis*, had nothing in view but ſcandalous defamatory libels. *Libellus* is not always to be taken as a technical word; in this it may ſtand as an obſcene little book. And as to the caſe of *Read*, there was no judgment, but it went off upon the Chief Juſtice's ſaying, why don't you go to the ſpiritual court; which was giving a falſe reaſon for that ſudden opinion, now it appears there is no inſtance of the ſpiritual court's intermeddling, where it is reduced to writing or in print.

Chief Juſtice. I think this is a caſe of very great conſequence, though if itwas not for the caſe of the *Queen*, *v. Read*, I ſhould make no great difficulty of it. Certainly the ſpiritual court has nothing to do with it, if in writing: and if it reflects on religion, virtue, or morality, if it tends to diſturb the civil order of ſociety, I think it is a temporal offence. I do not think *libellus* is always to be taken as a technical word. Would not trover lie *de quodam libello intitulat:* the New Teſtament, and does not the ſpiritual court proceed upon a libel?

Forteſque J. I own this is a great offence, but I know of no law by which we can puniſh it. Common law is common uſage, and where there is no law, there can be no tranſgreſſion. At common law drunkenneſs, or curſing and ſwearing were not puniſhable; and yet I do not find the ſpiritual court took notice of them. This is but a general ſolicitation of chaſtity, and not indictable. Lady *Purbeck's* caſe was for procuring men and women to meet at her houſe, and held not indictable, unleſs there had been particular facts to make it a bawdy-houſe. To make it indictable there ſhould be a breach of the peace, or ſomething tending to it, of which there is nothing in this caſe. A libel is a technical word at common law, and I muſt own the caſe of the *Queen*, *v. Read*, ſticks with me. And in Sir *Charles Sedley's* caſe there was a force in throwing out bottles upon the people's heads.

Reynolds J. It is much to be lamented if this is not puniſhable. I agree there may be many inſtances, where acts of immorality are of ſpiritual cognizance only; but then thoſe are particular acts, where the proſecution is *pro ſalute animæ* of the offender, and not where they are of a general immoral tendency: which I take to be a reaſonable diſtinction. *Read's* caſe is indeed a caſe in point. But I confeſs I ſhould not have been of that opinion. *Libellus* does not *ex vi termini* import defamation, but is to be governed by the epithet which is added to it. This is ſurely worſe than Sir *Charles Sedley's* caſe, who only expoſed himſelf to the people

then

then preſent, who might chuſe whether they would look upon him or not; whereas this book goes all over the kingdom. Drunkenneſs and ſwearing were puniſhable in the ſpiritual court, before the acts which made them temporal offences, and in which the juriſdiction of the ſpiritual court is ſaved.

Probyn J. inclined this to be puniſhable at common law, as an offence againſt the peace, in tending to weaken the bonds of civil ſociety, virtue, and morality. But it being a caſe of great conſequence, it was ordered to ſtand over for a further argument.

The Court in a few days after gave it as their opinion, that this was a temporal offence. They ſaid it was plain the force uſed in *Sedley's* caſe, was but a ſmall ingredient in the judgment of the Court, who fined him 2000l. And if the force was all they went upon, there was no occaſion to talk of the Court's being *cenſor morum* of the king's ſubjects. They ſaid if *Read's* caſe was to be adjudged, they ſhould rule it otherwiſe: and therefore in this caſe they gave judgment for the king. And the defendant was afterwards ſet in the pillory, as he well deſerved.[a] The *King* againſt *Curl*, *King's-Bench*, 2 *Strange's Reports*, 788. M. Term, 1 *Geo.* II. 1728.

GLEANING.

IT hath been ſaid, that by the common law and cuſtom of *England*, the poor are allowed to enter and glean upon another's ground after the harveſt, without being guilty of treſpaſs, which humane proviſion ſeems borrowed from the Moſaical law. 3 *Black. Com.* 213. The queſtion has ſince, been fully diſcuſſed and decided in the following caſe.

Houghton and his wife the defendants, were pariſhioners, and legally ſettled in the pariſh of *Timworth* in *Suffolk*; they were poor, neceſſitous, and indigent perſons, and after the

 plaintiff

[a] This *Edmund Curl*, ſtood in the pillory at *Charing Croſs* but was not pelted, or uſed ill; for, being an artful, cunning (though wicked) fellow, he had contrived to have printed papers diſperſed all about *Charing-Croſs*, telling the people, he ſtood there for vindicating the memory of queen *Anne*; which had ſuch an effect on the illiterate mob, that it would have been dangerous even to have ſpoken againſt him. And when he was taken down out of the pillory, the mob carried him off, as it were in triumph, to a neighbouring tavern. 3 vol. State Trials, App. 94.

plaintiff *Steel*'s crop had been reaped and carried away, they entered for the purpoſe of taking the remaining diſperſed and ſcattered gleanings. The plaintiff brought this action of treſpaſs againſt them, and the queſtion was whether the poor have a right by the law of the land to *glean*. After being argued fully by counſel, the Court decided as follows:

Lord *Loughborough*: When the claim of a right to glean, was firſt brought before the Court, it was laid indefinitely to be in poor, neceſſitous, and indigent perſons. I was then of opinion againſt the claim.

1. I thought it inconſiſtent with the nature of property, which imports excluſive enjoyment.

2. Deſtructive of the peace and good order of ſociety, and amounting to a general vagrancy.

3. Incapable of enjoyment, ſince nothing which is not inexhauſtible, like a perennial ſtream, can be capable of univerſal promiſcuous enjoyment.

This right is now claimed by poor perſons *legally ſettled*: but in this form alſo it is equally liable to objection. There can be no right of this ſort enjoyed in common, except there is no cultivation, or where that right is ſupported by joint labour: but here neither of thoſe criteria well apply. The farmer is the ſole cultivator of the land, and the gleaners gather each for himſelf without any regard either to joint labour or public advantage. If this cuſtom were part of the common law of the realm, it would prevail in every part of the kingdom, and be of general and uniform practice: but in ſome diſtricts it is wholly unknown, and in others variouſly modified and enjoyed.

Although the diviſion of pariſhes is of very high antiquity, yet a right to a maintenance by ſettlement was firſt introduced by the ſtatute of the 43d *Eliz.* In antient times, tithes were divided into three parts, the firſt for the maintenance of religion, the ſecond for the church, and the third for the poor: but the third diviſion was a matter of charity rather than of right. When by the ſecond Lateran Council in the twelfth century, tithes was appropriated to particular pariſhes, they were not conſidered as making in any part a proviſion for the poor, which might be claimed as a right.

Although the law of *Moſes* has been cited as a foundation for this claim, the political inſtitutions of the *Jews* cannot be obligatory on us, ſince even under the chriſtian deſpenſation the relief of the poor is not a legal obligation, but a religious duty. The authority in our law upon which the right to glean is ſupported, is a dictum of Sir *Mathew Hale*, in the *Trials per pais*; but though I entertain the higheſt reſpect for the authority and character of that great Judge, yet it would be doing injuſtice to his memory, to take every

haſty

haſty expreſſion of his at *niſi prius*,* as a ſerious and deliberate opinion. In truth, that dictum imports no more than that the queſtion could not be raiſed without being put upon the record.

The conſequences which would ariſe from this cuſtom being eſtabliſhed as a right, would be injurious to the poor themſelves. Their ſuſtenance can only ariſe from the ſurplus of productive induſtry; whatever is a charge on induſtry, is a very improvident diminution of the fund for that ſuſtenance: for the profits of the farmer being leſſened, he would be the leſs able to contribute his ſhare to the rates of the pariſh: and thus the poor, from the exerciſe of this ſuppoſed right in the autumn would be liable to ſtarve in the ſpring.

Gould, J. differed in opinion from Lord *Loughborough*. Suppoſing a general right of leaſing in *England*, I think it muſt be in the caſe ſtated in theſe pleadings, which is after the crop is reaped and carried away, and for the poor and indigent pariſhioners. If there be ſuch a general right, it muſt be by the common law of the land, and though it ſhould be admitted that in certain places there may be particular regulations of its exerciſe by cuſtom, that will not derogate from the general right, any more than ſpecial modes of deſcent in certain diſtricts will derogate from the courſe of deſcent by the common law, which will be intended to prevail, unleſs a cuſtom is ſhewn to the contrary.

In the caſe of *Worllege, v. Manning*, in this Court it was well obſerved by my brother *Walker* (a very learned and accurate lawyer) that it was a ſingular taſk to be called upon to prove the general common law of the land: that depends on general knowledge, it being univerſally exerciſed, or ſo underſtood. Speaking for myſelf, I have always underſtood this cuſtom to prevail in ſuch parts of this country where I have been converſant, and never heard it doubted. And I cannot but impute the reaſon of ſo few paſſages in the books of our law recognizing it, to the conviction of its being a right too well eſtabliſhed and too notorious to be diſ-

* *Niſi prius.* The Courts of *aſſize* & *niſi prius*, are compoſed of two or more commiſſioners, who are twice in every year ſent by the king's ſpecial commiſſion all round the kingdom, (except *London* and *Middleſex*, where courts of *niſi prius* are holden in and after every term, before the chief or other judges of the ſeveral ſuperior courts; and except the four northern counties, where the aſſizes are holden only once a year) to try by a Jury of the reſpective counties the truth of ſuch matters of fact, as are then under diſpute in the courts of *Weſtminſter-Hall*. Theſe facts by the courſe of the courts are uſually appointed to be tried at *Weſtminſter* in ſome Eaſter or Michaelmas term, by a Jury returned from the county wherein the cauſe of the action ariſes; but with this proviſo, *niſi prius*, unleſs before the day prefixed the Judges of aſſize come into the county in queſtion. This they are ſure to do in the vacations preceding each Eaſter and Michaelm. terms, which ſaves much expence and trouble. 3 *Black Com.* 60.

puted. The firſt paſſage which I ſhall mention is that in *Trials per pais*, (page 534), in treſpaſs againſt one for gleaning on his ground, *per Hale*, *Norfolk*, ſummer aſſizes, 1668, "the law gives licence to the poor to glean, &c. by the general cuſtom of *England*, but the licence muſt be pleaded ſpecially, and cannot be given in evidence on not guilty."

This opinion is cited by Lord Chief Baron *Gilbert*, in his *Law of evidence*, and after allowing that it ought to be pleaded, he ſays, "It had been a ſufficient juſtification, for by the cuſtom of *England* the poor are allowed to glean after the harveſt: which cuſtom ſeems to be built on a part of the *Jewiſh* law, that allowed the poor to glean, and made the harveſt a general time of rejoicing."

Here the opinion of *Hale* is recogniſed by a learned Chief Baron, who affirms the right to be by the cuſtom of *England*. The next author who mentions it, is that eminent Judge, Mr. Juſtice *Blackſtone*, a text writer, and with great deliberation: his words are, "It hath been ſaid, that by the common law and cuſtom of *England*, the poor are allowed to enter and glean upon another's ground without being guilty of treſpaſs," for this he refers to *Gilbert*, and *Trials per pais*, and then adds "which humane proviſion ſeems borrowed from the Moſaical law;" and refers to *Leviticus* and *Deuteronomy*. This is in ſubſtance the ſame as is ſaid by *Gilbert*.

I will read the texts in *Leviticus*.

Leveticus, xix. 9, 10. "And when ye reap the harveſt of your land, thou ſhalt not fully reap the corners of thy field; neither ſhalt thou gather the gleanings of thy harveſt; and thou ſhalt not glean thy vineyard, neither ſhalt thou gather all the grapes of thy vineyard; thou ſhalt leave them for the poor and ſtranger, I am the Lord your God."

In *Leviticus*. xxiii. 22. there is the ſame prohibition to gather the gleaning of the harveſt, and concluſion, "thou ſhalt leave them unto the poor, and to the ſtranger, I am the Lord your God."

From what better fountain could it be drawn than the holy ſcriptures? It was evidently founded on charity, and fit to be received in every country. It might be liable to be abuſed; but that would be redreſſed by the law, and the party abuſing became a treſpaſſer *ab initio*, as in other caſes of abuſe of a legal right or licence, the known caſe of coming into an inn or tavern, &c.

From *Selden*, de Jure nat. &c. it appears that the actual property was veſted in the poor, unleſs they abſolutely neglected the collection, and then it belonged to the owner of the field; and it did not accrue to the poor as a donation but a legal right.

It

It was thought to be of ſo ſacred a nature that it was exempted from tithes. *Seld. Hiſt. of Tithes*, vol. 6, 1087.

It hath been ſaid, the eſtabliſhed proviſion for the poor by the ſtat. 43 *Eliz.* hath had the effect of aboliſhing this right, ſuppoſing it to have exiſted, but lord *Hale*, *Gilbert*, and *Blackſtone*, had no ſuch idea; they conſidered it as a ſubſiſting right, without regard to that proviſion.

Indeed there ſeems to me to be no ground to ſupport ſuch a notion. I think ever ſince the ſettlement of pariſhes, the poor inhabitants were eſteemed as pariſhioners, and their neceſſities to be relieved by the pariſh to which they belonged.

Under the *Saxon* conſtitution, they were reſtrained to vills, and the inhabitants were to be in pledge, or in *manupaſt*; the policy of which was admirable, to reſtrain them from becoming vagabonds, in ſubjecting thoſe who received them, if they ſuffered them to continue above three nights, to anſwer for their miſdeeds.

After the inſtitution of pariſhes we find in that antient treatiſe, the *Mirrour*, chap. 1. p. 14. this paragraph: "It was ordained that the poor ſhould be ſuſtained, by the parſons, rectors of churches, and by the pariſhioners, ſo that none ſhould die for want of ſuſtenance." This neceſſarily ſuppoſes the reſidence of the poor. This is ſtrongly inforced by the ſtatute 15 *Rich.* II. c. 6. Which, reciting that damages happen to pariſhioners by appropriation of benefices of the ſame places, enacts that "upon a licence of appropriation of a pariſh church, the ordinary ſhall ordain a convenient ſum to be diſtributed yearly of the profits of the church by the appropriators to the poor pariſhioners in aid of their living and ſuſtenance.

The effect of the 43d of *Eliz.* is to eſtabliſh a more clear and ſtrict obligation on pariſhes for the maintenance of the poor, and the very deſcription of the officers is overſeers of the poor of the ſame pariſh. Since that act, modes of obtaining ſettlements in pariſhes, and for moving and ſending the poor thither, have been introduced; but before, it ſeems, the ſettlement was by birth; and the proviſions were firſt made by the ſtat. 22 *Hen.* VIII. c. 12. for ſending vagrant or wandering perſons to the pariſh where born, if it could be known, otherwiſe where they laſt dwelled, for three years; and by the 39th *Eliz.* where born, if known, if not, then to the pariſh where they laſt dwelled for the ſpace of one year; and if neither known, then to the pariſh where they laſt paſſed without puniſhment; ſo that it is evident they were reſtrained in point of reſidence, and the place of birth was the

the primary object; and there, according to the *Mirrour*, confirmed by the act of 15 *Rich.* II. their wants and neceſſities were to be provided for. In this light, the recital in the 15 *Rich.* II. of damages to the pariſhioners, and the proviſion for future appropriations in aid of the poor, are clear and intelligible.

The ſtat. 39 *Eliz.* rendered begging and wandering abroad inexcuſable, but affords no ground for conſtruction to take away the charitable and humane (as *Blackſtone* calls it) proviſion for the poor, permitting them to gather the derelict ears of corn, after the owner has carried away the crop. Nor is there a colour to ſay, that the practice has been diſcontinued ſince that ſtatute, or that any ſuch idea occurred to either of theſe lawyers whoſe opinions have been quoted.

The etymology of the names which this cuſtom has received in *England*, plainly proves, that the cuſtom itſelf was known both in *Germany* and *France*. *Minſhew* in *voce* glean, explains them thus:—The *French*, *glainer* quaſi *graner*, i. e. *colligere grana*; the *Belgic*, *arenleſen*; the *Teutonic*, *ahrleſen*, *ex ahr*, *ſpica*, *and leſen*, i. e. *colligere*; and goes on with the *Spaniſh*, &c. Then follows, a *gleaner*, or *leaſer of corn*, *French*, *glaneur*; *Teutonic*, *ahrleſen*; *Belgic*, *ahrenleſer*; *Engliſh*, a *leaſer*.

It is clear to me the word *leaſing* was brought from the *Germans*, and *gleaning* from the *Normans*; and that from *ahr* proceeds *ahriſh*, uſed in many parts of *England*, for ſtubble.

Plato ſays, "*qui intelligit nomina, res etiam intelligit;*" and *Iſidorus*, "*Nomina rerum ſi neſcis, perit cognitio rerum.*" In the caſe of the *King*, v. *Price*, 4 *Burr. Rep.* 1927, Mr. Juſtice *Hewit*, ſays, "the right of leaſing does appear in our books (he muſt mean in *Trials per pais*, and *Gilbert*;) but it muſt be under proper circumſtances and reſtrictions." I preſume he means after harveſt or clearance of the crop, and in a proper manner and time; or, in caſe of a cuſtom, that ſuch cuſtom is to be obſerved.

With reſpect to the exerciſe of this right, the caſe upon this record ſtates, that what the defendants did, was after the crop was carried. This correſponds with Lord Chief Baron *Gilbert's* expreſſion of *after the harveſt*. As to the times of beginning it, it appears by *Selden*, as already mentioned, that it ought not to be delayed; for a palpable neglect would be a deſertion of it. If no preciſe time were limited, our law would call it a convenient time.

By an act of parliament, paſſed in the year 1786, for incloſing the common fields of *Baſingſtoke*, the gleaning or leaſing is to begin after the crop is carried. Times are mentioned,

mentioned; one for wheat, and another for other ſpecies of grain, for the exerciſe of this right; and the owners of the land are reſtrained under penalties (a ſtrong circumſtance to ſhew their ſenſe of the right of the poor) from putting in cattle or hogs, within thoſe reſpective times. On the other hand, the poor are reſtrained, by a ſummary penalty, from breaking the fences (which, it might be apprehended from the former open ſtate, they might be apt to do) and are confined to paſs through the gates.

This ſeems to have been a prudent regulation to prevent diſputes. The act calls it a privilege, but ſays it had been claimed and exerciſed from time immemorial. What is this but a right? the enjoyment of which, the landholders ſecure to the poor by penalties on themſelves.

Upon the whole, therefore, I am of opinion, that judgment ought to be for the defendants.

Heath, J. who agreed with lord *Loughborough*.

On theſe pleadings the general queſtion is, "Whether the indigent and neceſſitous poor of a pariſh have a right to glean after the crop is carried away?" It is our province to take notice of all general cuſtoms. This is uſually not attended with much difficulty, as the evidence of ſuch cuſtoms is to be found in our books, and is matter of general practice. Although it is inſiſted on, that this cuſtom of gleaning is coeval with the conſtitution, and derived from the moſt remote antiquity; yet the firſt mention of it is in the *trials per pais*, a mere extrajudicial opinion of the Lord Chief Juſtice *Hale*, "That by the cuſtom of *England*, the poor have a right to glean." The next author who mentions it, is Lord Chief Baron *Gilbert*, who, in copying the above paſſage with a marginal reference, ſays, that the poor are "allowed to glean," which implies a licence and permiſſion, rather than a right. Mr. Juſtice *Blackſtone* has received the ſame paſſage into his commentaries, not as a clear and undeniable rule of law, but with expreſſions of diſtruſt and doubt, and gives no opinion of his own. The whole weight then of legal authority to prove this cuſtom reſts on the *dictum* of Sir *Matthew Hale*.

It has been argued in favour of this claim, that no corn is claimed but what is abandoned by the owner; as if the owner had caſt it from him, and it became the property of the poor by a ſort of occupancy. By the law of *England*, no property can be loſt by abandonment, for the owner may at any time reſume the poſſeſſion. Here there can be no abandonment, as the owner never parted with the poſſeſſion.

Such

Such a cuſtom as will ſupport the plea, muſt be univerſal, and every where the ſame, otherwiſe it is void for its uncertainty. If it exiſts in particular counties or diſtricts (ſuch as the cuſtom of being diſcharged from the payment of tithes of wood in ſome hundreds in the wilds of *Kent* and *Suſſex*, or the cuſtom of *Gavelkind*) it is partial, and no part of the general cuſtoms of the realm. From the beſt inquiries I have been able to make, I find that this cuſtom is not univerſal. In ſome counties it is exerciſed as a general right, in others, it prevails only in common fields, and not in incloſures, in others it is precarious, and at the will of the occupier. In the county where this action was brought, it never in practice extended to barley; nor is the time aſcertained. In ſome counties the poor glean whilſt the corn is on the ground; here the uſage is laid to be after the crop is harveſted.

The practice of gleaning was originally eleemoſynary. But it is the wiſe policy of the law, not to conſtrue acts of charity, though continued and repeated for never ſo many years, in ſuch a manner as to make them the foundation of legal obligations. If A. and his anceſtors, have from time immemorial repaired a bridge or a highway, there is no obligation on him to continue the repair, unleſs he is ſo bound by the tenure of lands or the like.

Wherever there is a right, the law provides a remedy, if that right be obſtructed. But ſuppoſe the owner of a field were to ſet fire to the ſtubble, or to flood it, and prevent the poor from gleaning, what remedy could they have? No action on the caſe has ever been brought for ſuch an injury, and according to the reaſoning on the ſtatute of *Weſtminſter*, 2d. 13 *Ed.* I. c. 24. no action on the caſe would lie.

Tithes are due of right, and by the general uſage of the realm; the parſon had no remedy at common law till they were ſet out, therefore the conſent of the occupier of the land was neceſſary to be obtained before the parſon could take a ſingle ſheaf. The caſe of tithes is much ſtronger than that of gleaning, becauſe the church was originally endowed by the owners of lands; and the parſon, in conſideration of that endowment, undertook the cure of ſouls: ſo that there was a valuable conſideration for the right of tithes, which is wanting with reſpect to gleaning. Yet the wiſdom of our anceſtors left it to the conſcience of the occupier of the land, whether or not he would ſet out his tithes, though that conſcience was to be corrected by the authority of the ſpiritual court,

I ſhall

I ſhall next conſider what force this cuſtom derives from being a *Jewiſh* inſtitution. Every inſtitution which is to be found in the law of *Moſes*, was not inforced by the Judge, many of them being left to the conſciences of men, with temporal bleſſings on thoſe who obſerve them. The right of gleaning is given by the ſame law as well to the "ſtranger," as the "fatherleſs and poor." We have already infringed it, as we have decided that the ſtranger has no right to glean in the caſe of *Worlledge, v. Manning*.

The law of *Moſes* is not obligatory on us. It is indeed agreeable to chriſtian charity, and common humanity, that the rich ſhould provide for the impotent poor; but the mode of ſuch proviſion muſt be of poſitive inſtitution. We have eſtabliſhed a nobler fund, we have pledged all the landed property of the kingdom for the maintenance of the poor, who have in ſome inſtances exhauſted the ſource.

The inconvenience ariſing from this cuſtom being conſidered as a right by the poor, would be infinite; and in doubtful caſes, arguments from inconvenience are of great weight. It would open a door to fraud, becauſe the labourers would be tempted to ſcatter the corn in order to make a better gleaning for their wives, children, and neighbours. It would encourage endleſs diſputes between the occupiers of land and the gleaner. It would raiſe the inſolence of the poor, and leave the farmer without redreſs. Experience ſhews, that during the time of the harveſt, the poor employ their time in gleaning, to the great detriment of huſbandry. In many places the farmer ploughs the land whilſt the ſhocks of corn are upon the ground. Is the cultivation of the country to ſtand ſtill while the labourers are gleaning?

It has been alledged as a reaſon for this claim, that the poor ought to have a ſhare of benefit, at the time of general rejoicing: to this it may be anſwered, that they receive from the advanced price of labour, a recompence in proportion to their induſtry.

But to ſanction this uſage, would introduce fraud and rapine, and entail a curſe on the country.

To conclude: as there is no evidence of this cuſtom of gleaning, prevailing uniformly throughout the kingdom; as the practice of it is uncertain and precarious; and as it would be attended with great public inconvenience if it were inforced as a right, I am of opinion that it is not part of the general law of the land; the plea is therefore bad, and judgment muſt be given for the plaintiff.

Wilſon, J. I am of the ſame opinion with my Lord chief Juſtice

Juſtice *Loughborough* and my brother *Heath* on the queſtion now before the Court.

No right can exiſt at common law, unleſs both the ſubject of it, and they who claim it, are certain. In this caſe both are uncertain. The ſubject is the ſcattered corn which the farmer chooſes to leave on the ground, the quantity depends entirely on his pleaſure. The ſoil is his, the culture is his, the ſeed is his; and in natural juſtice, his alſo are the profits. Though his conſcience may direct him to leave ſomething for the poor, the law does not oblige him to leave any thing. The ſubject then is uncertain and precarious.

Next the perſons claiming this right, are vague and undefined. The term poor is merely relative. Before the ſtatute of the 43d. of *Eliz.* there was no method of legally aſcertaining who were of that deſcription. Since that ſtatute, juſtices and overſeers are to determine what perſons are of the number of poor, to whom alſo muſt be added, the qualifications of a ſettlement.

They who claim this right then, are equally uncertain and precarious.

The practice alſo of gleaning, is itſelf uncertain and changeable. In ſome counties it is entirely excluded, in others, particularly admitted, and in others, modified with every poſſible variety.

The law of *Moſes* is not binding on us, except ſo far as we have thought proper to adopt it. There are many precepts of the goſpel, which the law of *England* does not enforce as obligations. It is the duty of every man to "Honour his father and mother," but the law of *England* has no method to compel ſuch honour. Charity to the poor is alſo a chriſtian duty, but it muſt be voluntary, and cannot be compelled.

But if there be a right, there muſt alſo be a remedy, if that right be infringed. Now if a rich man were to glean in a harveſt-field, to the excluſion of the poor, they could have no remedy. So if a farmer were to give permiſſion to his brother, or friend of another pariſh, to glean his fields, the poor of his own pariſh could have no remedy in law, for what they might think a prior right.

Next the authorities are to be conſidered. The paſſage cited from the *Trials per pais* contains a *dictum* but not a judical opinion of Sir *Matthew Hale*. Every one who hears me, muſt acknowledge the impropriety of conſtruing all the converſation which paſſes between a judge and the counſel on a trial, as legal deciſion. It would in this inſtance, be want

of

WAGERS.

GROVET laid a wager with *Wall*, that he would walk to *High-Park* Corner in ſuch a time: now there being no ſuch place as *High Park*, but *Hide Park Corner*, he could not walk to a place that was not in being, and therefore the Court held that *Grovet* loſt his wager. *Wall* againſt *Grovet*, 12 Modern Reports, 416. A. D. 1700.

The following bet was laid at *Newmarket*. It was a wager (to uſe the phraſe of that place) to run their reſpective fathers each againſt the other. Sir *William Codrington*, the father of Mr. *Codrington*, was then a little turned of fifty: Mr. *Pigot's* father was upwards of ſeventy. Lord *Oſſory* computed the chances, according to the abovementioned ages of their reſpective fathers. Mr. *Codrington* thought the computation was made too much in his diſfavour. Whereupon lord *March*, agreed to ſtand in Mr. *Codrington's* place: and reciprocal notes were accordingly given between the earl and Mr. *Pigot*. Mr. *Pigot's* note run thus,—"I promiſe to pay to the earl of *March*, 500 guineas, if my father dies before Sir *William Codrington*. *William Pigot*." The earl's was—"I promiſe to pay to Mr. *Pigot*, 1600 guineas, in caſe Sir *William Codrington* does not ſurvive Mr. *Pigot's* father. *March*." No mention was at all made, at the time of this tranſaction, about their fathers being then dead or alive. But the fact was, that Mr. *Pigot's* father was then actually dead: he died in *Shropſhire*, 150 miles from *London*, at two o'clock in the morning of the ſame day, on which this bet was made at *Newmarket*, after dinner. However, this fact was not, at that time, at all known to any of the parties; nor was there any reaſon for ſuſpecting that Mr. *Pigot's* father was then dead. Mr. *Pigot* refuſed to pay lord *March* the 500 guineas, becauſe his father was dead when the bet was made, therefore his lordſhip brings this action againſt Mr. *Pigot*. The objection was, that the contract was void. It was without any conſideration: for, there was no poſſibility of *Pigot's* winning, (his father being then actually dead;) and therefore he ought not to loſe. It was a contract in *futuro*, manifeſtly made upon the ſuppoſition of a then future contingency.

tingency. The meaning cannot be doubted: and the words ſufficiently expreſs that meaning. "If my father dies before Sir *William Codrington*, is equivalent to ſaying "if my father ſhall die before Sir *William Codrington*." But his father was dead before he entered into this contract.

Mr. *Lee* ſaid, it was given in evidence, and is certainly true, that their fathers being dead, or being alive, made no difference in the proportion of the value of the chance:—And he obſerved, that in the caſe of an inſurance upon a ſhip, if the words, "loſt or not loſt," be not inſerted; and the fact ſhould happen to be, that the ſhip was actually loſt at the time when the inſurance was made; the inſurance is void.

Mr. *Walluce*, Mr. *Dunning*, and Mr. *Mansfield*, on behalf of the plaintiff, lord *March*, ſaid that the inſertion of the words, "loſt or not loſt," was peculiar to *Engliſh* policies: it is not inſerted in the policies of other nations. *Roccius, fo.* 205, No. 175. And the reaſon there given (at the end of it), namely, "that the fact being unknown will not prejudice the inſurance," applies to the preſent caſe.

Suppoſing it to have related to the death of perſons in *India*, or the ſafety of the *Aurora*, can any one imagine that the inſurance would be void becauſe the event had happened antecedent to the making of the contract?

The event of either of the two fathers being then already dead, did not occur to the parties. If it had, it would not have varied the bet. The two reciprocal notes undoubtedly mean one and the ſame event. Retroſpect is included, as well as futurity.

Mr. *Lee* and Mr. *Bolton*, for the defendant, Mr. *Pigot*, replied, that by the law of *England*, it is neceſſary to inſert the words, "loſt or not loſt," in ſhip-policies: otherwiſe the inſurance is void, if the ſhip was then already loſt. And this, they ſaid, was expreſsly laid down by *Molloy*.

The bet went upon the idea that both fathers were then living: and ſo the evidence agreed. The bet was clearly future. If a bet be laid upon two horſes; and one is dead at the time; it is no bet.

The caſe of the *Mills* frigate was an inſurance upon a ſhip which had a latent defect totally unknown to the parties: and the inſurers were holden not liable, upon account of the ſhip's being not ſea-worthy, though ſuch defect was not known.

Lord *Mansfield*. I differ totally in opinion from that doctrine. The determination in that caſe, (which was made by my Lord Chief Juſtice *Wilmot*, and me, to whom it was referred), was made quite upon another ground: and the

change

change of opinion in the Court of Common Pleas, happened upon the citing of two caſes that had been determined before me; which caſes were miſtaken. The inſured ought to know whether his ſhip was ſea-worthy or not, at the time when ſhe ſet out upon her voyage: but how ſhould he know the condition ſhe might be in, after ſhe had been out a twelvemonth?

The queſtion here is, "what the parties really meant?" The material contingency was, "which of theſe two young heirs ſhould come to his father's eſtate firſt?" It was not known that the father of either of them was then dead. Their lives, their healths, were neither warranted nor excepted. It was equal to both of them, whether one of their fathers ſhould be then ſick or dead. All the circumſtances ſhew, that if it had been then thought of, it would not have made any difference in the bet; and there was no reaſon to preſume that they would have excepted it.

The intention was, that he who came firſt to his eſtate ſhould pay this ſum of money to the other who ſtood in need of it. That the event had happened, was in the contemplation of neither party.

Both notes are ſo penned, as to be applied to what was to happen. But the nature of ſuch a contract, and the manifeſt intention of the parties ſhew "that he who ſucceeded to his eſtate firſt, by the death of his father, ſhould pay to the other," without any diſtinction whether the event had or had not, at that time, actually happened.

Mr. Juſtice *Aſton*. It was originally intended to be a bet between two young heirs apparent: and the material point to be ſettled was to fix the difference of the chances of the ſurvivorſhip of their fathers. The mere ſurvivorſhip was the thing intended to be betted upon.

Judgment was given for the plaintiff, the earl of *March*. The *Earl* of *March* againſt *Pigot*, *King's-Bench*, 5 *Burrow's Reports*, 2802, 14 *June*, 1771.

From the whole it appears, that it is eſſential to a fair wager, that the contingency which is to decide the wager be unknown to both parties, for if either party have a certainty of winning the wager is void; and although the contingency, on which the wager depends, happens before the bet is laid, it is notwithſtanding good, if both parties be ignorant of it.

Da Coſta paid *Jones* 75 guineas, in conſideration that *Jones* would pay him 300l. in caſe *Monſieur le Chevalier d'Eon* ſhould at any time prove to be a female. This wager was

laid in 1771, and there were many wagers of the ſame nature on the ſex of the ſame perſon. In 1777, *Da Coſta*, brought an action againſt *Jones*, and a verdict for 300l. was given for *Da Coſta*; from which it appears, that the Jury from the evidence produced, believed the *Chevalier* to be a woman. In 1778 the counſel for *Jones* applied to the Court of King's-Bench, to ſet aſide this verdict [a] on two grounds, firſt, becauſe the wager was on a queſtion tending to introduce indecent evidence; ſecondly, becauſe it materially affects the intereſt of a third perſon: the counſel for *Da Coſta*, viz. *Wallace*, *Buller* and *Dunning*, to eſtabliſh the verdict, argued, that by the law of *England*, wagers upon every poſſible ſubject are lawful; ſuch only excepted, as are ſpecially prohibited by poſitive ſtatute: viz. wagering policies upon ſhips, &c. intereſt or no intereſt, and ſuch as are made void by the ſtatutes againſt gaming. But even theſe were lawful antecedent to the ſtatutes that reſtrain them. Every other ſubject therefore remains open to this ſpecies of contract, as it did at common law. And there, whether the parties were intereſted or not, was totally immaterial. But if it were material in this caſe, the parties certainly were intereſted from the moment of ſubſcribing to the policy. The ſingle queſtion therefore, is, whether the ſex of a perſon is an improper ſubject of a wager. And firſt, as to the objection, that it tends to introduce indecent evidence: no doubt, many ſuch wagers have exiſted. Inſurances upon the ſex of children unborn, are frequent. Maſter *Holford*'s policy upon lady *Lade's* child, if it had been brought to trial, would equally have led to indecent evidence: but no one ever thought it void, or objectianable on that account. In pedigrees, it is not uncommon for the ſame ſort of evidence to ariſe. Suppoſe a wager, whether a particular act was done by a man or a woman; or a life inſurance, with an exception as to a particular diſeaſe; the diſcuſſion of theſe, and many other ſubjects might involve the greateſt indecency. But courts of juſtice do not reject the contracts of parties, becauſe the ſubject matter happens to be indecent or indecorous. What can be a greater violation of all decorum, than for two ſons to run their fathers lives againſt each other? and yet the caſe of the earl of *March* v. *Pigot*, was entertained, and ſolemnly adjudged in this Court, in favour of the contract, without a thought or idea of its being liable to any ſuch objection. In the caſe of *Jones* v. *Randall*, *Hill*, 14 *Geo.* III. B.R. which was a wager upon the event of a ſuit then depending, and part heard before the Houſe of Lords, the objection of its being contrary to good morals, applied

[a] See p. 42, note [*].

plied in the ſtrongeſt manner poſſible; becauſe the eſſential requiſite to the validity of a wager, namely, that there ſhould be an equal chance of winning or loſing, could only exiſt in that caſe upon the ſuppoſition that the houſe were ſo ignorant as not to know the law, or, knowing it, were ſo profligate as to decide contrary to law. But the Court were clear in overruling the objection, and confirmed the contract. Here, however, the objection is not even warranted by the fact. For the ſubject matter was not only capable of being proved, but has been proved in three ſucceſſive trials, without indecent evidence. The time to have objected, would have been when any ſuch evidence appeared; not becauſe it poſſibly might appear. There is nothing therefore in this objection; and if there were, it is in this caſe premature. Secondly, As to the poſſibility of its affecting the intereſt of a third perſon; the objection perhaps may hold, where the proceedings are merely fictitious or colluſive, and where they are ſet on foot for no other purpoſe than to injure a third perſon who is innocent; as in *Muilman's* caſe: but the ground upon which the Court interferes in ſuch a caſe is, that the proceedings are a contempt of the Court; and therefore, at the inſtance of the party liable to be injured, the Court will ſtay them and puniſh the contempt. So if this had been a mere contrivance to affect an innocent perſon, the Court might have conſidered it as a contempt. But the caſes are totally different. This is a fair *bona fide* wager; made no leſs than ten years ago, without the ſmalleſt intention of affecting the *Chaveleir d'Eon*, in the ſlighteſt degree. The ſilence of the parties till this time, clearly ſhews that: and even now, the action would not have been brought to trial, but for the evidence furniſhed by the *Chevalier* herſelf, in her diſpute with *Demorand*. But in what manner can it affect her? There is nothing criminal in having aſſumed the habit or the form and character of a man, and having fought the battles of her country, or ſerved it as a miniſter of ſtate. But if it is criminal, the conſequences ariſing from it are the effect of her own conduct. She has impoſed upon the world by aſſuming a character that did not belong to her; and therefore, ought not to be protected in continuing the cheat. So that, either way, the objection falls to the ground. And if the *Chevalier* could not avail herſelf of it, *a fortiori* the defendant, who is an indifferent perſon, cannot. But is it not every day's practice for third perſons to be affected, and very materially ſo, by trials in the common and ordinary courſe of juſtice? What could be more painful to a father, than to have a wager upon his own life laid by his ſon, publicly canvaſſed

vaſſed and diſcuſſed in a court of juſtice? A wager was lately tried upon the place of nativity of the dutcheſs of *Hamilton*, and her ſiſter, whether it was in *England* or *Ireland*; which produced an enquiry that aſcertained their ages: a very ſerious inconvenience probably to them, but it would have been no ground for ſtaying the regular proceedings of a court of juſtice. But here the objection itſelf falls, becauſe all the public characters which the *Chevalier* has filled, are paſt. As there is no ſubſtantial objection therefore, either upon principle or authority, nor any founded in fact, to bar the plaintiff's right of action in this caſe, the verdict ought to ſtand.

Mr. *Bearcroft*, and Mr. *T. Cowper*: *contra*, to ſet aſide the verdict argued that there is ſufficient foundation upon both objections; and the ground is this: that to permit ſuch a wager to be diſcuſſed in a court of juſtice, is *contra bonos mores*. 1. It tends to introduce indecent evidence, where it is not neceſſary for the purpoſe either of civil or criminal juſtice, upon a queſtion, in which the parties have no intereſt whatever but of their own creating. 2. It tends to violate the peace of ſociety by exhibiting a third perſon, who is innocent, in a ridiculous and contemptible light to all the world, and to break in upon his private comfort and peace of mind. Wagers of this kind, are in themſelves a national diſgrace. Ought it to be endured in any country, that two perſons ſhall lay a wager upon an indecent ſubject, and then call upon the higheſt Court of juſtice in the kingdom to determine ſo improper a queſtion? To obviate this objection it has been ſaid, that in point of fact no indecent evidence was given in this caſe: but that is not ſtrictly ſo. The trial certainly was, and in the nature of it could not but be, indecent; and it is upon that, the objection turns: not, whether the language of the witneſſes, or the mode of conducting the trial, was indecent; but whether the nature of the ſubject was ſuch, that the moſt guarded caution, and warineſs in the mode of expreſſion, could not prevent indecent ideas from ariſing out of the cauſe. Where the purpoſes of public juſtice require that indecent evidence ſhould be given, as upon an indictment for a rape, the Court muſt of neceſſity ſubmit to the inconvenience; otherwiſe crimes would go unpuniſhed, and offenders eſcape. So, if neceſſary to the deciſion of private wrongs, or to the rights of individuals. Mr. Juſtice *Burnet* therefore was clearly wrong, (and it is not diſputed that he was ſo) in refuſing to try the action of defamation before him, in which a woman charged a man with having proclaimed to the world, that ſhe had a defect

defect in a particular part of her body. The defendant by way of plea juſtified, averring that it was true ſhe had a defect. When the cauſe was called on, Mr. Juſtice *Burnet* threw the record out of court. But the plaintiff was an injured perſon: therefore he certainly ought to have entertained the ſuit. Suppoſe a queſtion were to ariſe upon the right of inheritance of an *hermaphrodite*, who, lord *Coke* ſays, "ſhall be heir, either as male or female, according to that ſex which prevails." For the ſake of private juſtice it would be neceſſary to hear and decide upon the fact. So in the caſe of a particular diſeaſe excepted out of a policy for life: but not, if it were a mere voluntary wager, whether ſuch a perſon was an hermaphrodite, or had a particular diſorder. No more would the Court tolerate a wager, as to the cauſe why a married woman did not breed. And numberleſs other inſtances might be put. So palpable is the objection, that it is impoſſible to illuſtrate it by particular caſes without falling into indecency. 2. It affects the peace and comfort of a third perſon, and, as ſuch, the peace of ſociety. The caſes to which this has been compared, bear no ſimilitude to it. There is no ridicule attending a wager upon the ſex of an unborn child. In the caſe of the earl of *March* againſt *Pigott*, the reproach did not fall upon thoſe who were the ſubject of the wager, but upon the parties themſelves who laid it.——*Jones* againſt *Randal*, was a hedging wager by a party who was intereſted; it reflected on nobody: the event was quite uncertain; and the Court determined, that there was no objection to it, either in morality or policy. (Lord *Mansfield* here obſerved, never was a queſtion more doubtful how it would be decided till it was actually determined). But in this caſe, the intereſt of *d'Eon*, as well as his private feelings, are moſt materially affected. By the inveſtigation of his ſex, he may be expoſed to ridicule and contempt: And if, as was aſſumed in the argument, it goes to prove him an impoſtor, it is adding infamy to ridicule. It can never be, that mere volunteers in a wager ſhall be permitted wantonly to expoſe to the public view, every defect and imperfection of thoſe they think fit to ſelect for the purpoſe, and in aid of the enquiry, diſturb the peace of whole families, by calling confidential friends, profeſſional attendants, near relations and neceſſary attendants to give teſtimony of the fact. Therefore, upon principles of juſtice, the Court will now do, what ought to have been done at the trial, and allow the objection.

Lord *Mansfield*. This caſe, upon the trial of the firſt cauſe, made a great noiſe all over *Europe*: and ſoon after-

wards I own I was ſorry, that the nature of the action had not been more fully conſidered. I was ſorry for another thing; that the witneſſes who were called upon, had not been told they might refuſe to give evidence if they pleaſed. But no objection was made on their behalf by the counſel for the defendant, nor did any, of themſelves apply for protection, or heſitate to anſwer. I have ſince heard that many of them were confidential perſons, ſervants, and others employed in the way of their profeſſion, and buſineſs. Had any of them demurred, it would have opened the nature of the action. That two men by laying a wager concerning a third perſon, might compel his phyſicians, relations, and ſervants to diſcloſe what they knew relative to the ſubject matter of that wager, would have been an alarming propoſition: the bare ſtating it would have ſtartled. Indeed, the objection being put upon the general crude ground of the cauſe leading to indecent evidence, and not upon the ſpecial nature of this caſe, did not ſtrike me. For indecency of evidence is no objection to its being received, where it is neceſſary to the deciſion of a civil or criminal right: and upon that ground, we think that Mr. Juſtice *Burnet* did wrong, in rejecting the caſe that came before him; for there, the party had received an injury. But if it had been an action upon a wager; whether ſuch a woman had ſuch a defect or infirmity, it would have been nearly the preſent caſe. Indifferent wagers upon indifferent matters, without intereſt to either of the parties, are certainly allowed by the law of this country, in ſo far as they have not been reſtrained by particular acts of parliament: and the reſtraints impoſed in particular caſes, ſupport the general rule. For where parliament interpoſes and ſays, "unleſs you have an intereſt in ſuch a caſe, any wager or inſurance upon it ſhall be void and of no effect;" it implies, that in caſes not ſpecially prohibited by act of parliament, parties may wager or inſure at pleaſure. And this ſpecies of contract has, in fact, gone to an extent that is much complained of. Whether it would not have been better policy, to have treated all wagers originally as gaming contracts, and to have held them void, is now too late to diſcuſs: they have been too long and too often held good and valid contracts. But notwithſtanding they have been ſo generally entertained, there muſt be a variety of inſtances, where the voluntary act of two indifferent parties, by laying a wager, ſhall not be permitted to form a ground for an action or a judicial proceeding in a court of juſtice. Suppoſe a wager between two people, that one of them, or that a third perſon, ſhall

do

do a criminal act: to go from ſtronger caſes to thoſe that are leſs ſtrong. "I lay you a wager, you do not beat ſuch a perſon. You lay that you will." Such a wager would be void, becauſe it is an incitement to a breach of the peace. Suppoſe the ſubject matter of a wager were a violation of charity, or an immoral action: "I lay I ſeduce ſuch a woman." Would a court of juſtice entertain an action upon ſuch a wager? moſt clearly not; becauſe it is an incitement to immorality. Suppoſe a wager upon a ſubject *contra bonos mores*, like the caſe of Sir *Charles Sedley*; would a court of juſtice try a wager that incites to ſuch indecency? It may be ſaid, there are no adjudged caſes; but you offend; you miſbehave by laying ſuch a wager. To come nearer to the point: Suppoſe a wager that affects the intereſt, or the feelings, of a third perſon; which is one of the grounds upon which the motion to ſet aſide the verdict in this caſe has been argued. For inſtance: that ſuch a woman has committed adultery. Would a court of juſtice try the adultery in an action upon ſuch a wager? or, a wager that an unmarried woman has had a baſtard? Would you try that? Would it be endured? Moſt unqueſtionably it would not. Becauſe it is not only an injury to a third perſon, but it diſturbs the peace of ſociety; and in either of theſe two laſt caſes, the party to be affected by it would have a right to ſay, how dare you bring my name in queſtion? If a huſband complains of adultery, he ſhall be allowed to try it; becauſe he is a party injured. So, if it be neceſſary to juſtice, to try whether ſuch a one is a baſtard; it ſhall be tried. But third perſons, merely for the purpoſe of laying a wager, ſhall not thus wantonly expoſe others to ridicule, and libel them under the form of an action. We then come to the preſent caſe, which is ſhortly this. Here is a perſon who appears to all the world to be a man: is ſtated upon the record to be "*Monſieur le Chevalier d'Eon;* has acted in that character in a variety of capacities; and has his reaſons and advantages in ſo appearing. Shall two indifferent people, by a wager between themſelves, injure him ſo, as to try in an action upon that wager, whether (as was ſaid in the argument) he is a cheat and impoſtor; or, ſhew that he is a woman and be allowed to call on all his intimate friends, and confidential attendants, to give evidence that will expoſe him all over *Europe?* It is monſtrous to ſtate. It is a diſgrace to judicature. And if the *Chevalier*, by application to the Court or otherwiſe, had come and ſaid, here is a villainous wager laid to injure me; I pray the Court, as a third perſon whoſe intereſt it affects, to ſtop it; the Court would

would inſtantly have done it: upon the ſame principle as the court ſtayed the proceedings, upon the application of Mr. *Muilman*, in the caſe of *Coxe v. Phillips*. Wherever a queſtion ariſes upon a real matter of right, though the intereſt of third perſons, not parties, may be affected by it, it ſhall be tried.—If a witneſs lays a wager upon the ſubject matter in diſpute between a third perſon, it does not affect his evidence ſo as to defeat either party of it. I think the other ground is material. The queſtion is upon the ſex of a perſon, to the appearance of all the world, a man; and who, for reaſons of his own, thinks proper to keep his ſex a ſecret. The medium of proof upon ſuch a queſtion, muſt ariſe from the circumſtances that diſtinguiſh the ſexes. This neceſſarily tends to introduce all the indecent evidence ſuch an inquiry can involve. Suppoſe two perſons were to lay a wager, upon a mark or defect in a woman's body: will the Court ſay they would ſuffer her chambermaid to be called, to give evidence upon ſuch a queſtion? The caſe mentioned in the argument, of an inſurance by two ſons upon the lives of their reſpective fathers, and other caſes, where the life of one perſon is run againſt another, are not caſes that injure or affect the individuals who happen to be made the ſubject of ſuch a wager: they are no reflection or injury to them. So, a wager whether the next child ſhall be a boy or a girl, hurts no one. But the preſent caſe is indecent in itſelf, and manifeſtly a groſs injury to a third perſon; therefore, ought not to be endured. We think the objection appears ſufficiently upon the record, and that there is ground enough upon theſe allegations to arreſt the judgment. The verdict conſequently for *Da Coſta*, availed nothing. *Da Coſta* againſt *Jones*, *Court of King's Bench*, *Cowper's Reports*, 729, 31 Jan. 1778.

From the whole therefore it appears, that if a voluntary wager be laid between two indifferent perſons upon the ſex of a third, the money loſt in ſuch wager cannot be recovered in a Court of Law. 1ſt. Becauſe ſuch enquiry tends to indecent evidence. 2. Becauſe it tends to diſturb the peace of the individual and of ſociety. But indecency of evidence is no objection to its being received where it is neceſſary to the deciſion of a civil or criminal right.

LIBELS

LIBELS.

ONE conſideration for the Jury in giving their verdict in proſecutions for libels is, whether the innuendos contained in an ambiguous libel, have in point of fact the aim and meaning, which are aſcribed to them in the information or indictment. The following caſe affords a curious ſtring of innuendos, from whence the general reader will derive a knowledge of the mode of charging the offence in a legal way, and alſo of the little avail there is in the common practice of circulating libels under an idea of ſafety by inſerting only the initial letters of names, or in any other ambiguous manner: for if the Jury from the evidence given, is ſatisfied at whom ſuch libels are pointed, it is ſufficient to convict the party.

Benfield and *Saunders* were proſecuted by information on behalf of *Daniel Cooke*, and his two children, *John* and *Jane Cooke*, for two libels, one of which was as follows.

THERE are two people in *Chelthenham* town,
The one a luſty ſpark:
They both do take delight in game;
Each one doth keep a park.

In one there is a buck,
In the other there is a doe,
And if you can but favour get,
A hunting you may go.

But if that ſhe is going proud,
And like to be at rut,
They turn her into a neighbour's park;
And there to take the buck.

And when that he has done his beſt,
And this fine doe is cloy'd;
Then up ſhe goes to *London* town,
Her young one for to hide.

And

And when ſhe had been there a while,
If that you will but mind,
Then out ſhe cometh from that park,
And leaves her fawn behind.

But yet a while in town muſt ſtay;
Till all things ſafe, and ſound:
Then home ſhe comes to her own park
To take another round.

The other Libel was as follows:

COME all you jolly wonters bold
And take a turn with me;
Such ſport I'll ſhew each night,
Before you ne'er did ſee.
And a wonting we will go, will go,
And a wonting we will go.

My maſter *Johnny Moll* has got,
Such tricks enough in ſtore:
His fame is ſpread from eaſt to weſt,
On ſhutters, poſts and doors.
And a wonting we will go, &c.

When night has ſpread her ſable veil,
And all things ſafe and ſure,
He'll ſhew you tricks, he'll never fail,
If you'll but nick the hour.
And a wonting, &c.

We hire men to catch our wonts,
Who ſteal them when 'tis done:
We love our puggs; we dearly hugg:
And is not this good fun?
And a wonting, &c.

For every trap has got a trick,
To make the game his own:
The like was never known before,
In country, city, or town.
And a wonting, &c.

No

No begging diſh-clout e'er ſhall wipe
Away ſo great a blot:
For all their talk, and all their balk,
It will not be ſo ſoon forgot.
And a wonting, &c.

And the fame of *Johnny's Moll*,
Is ſeen on every door,
Each yard, each ſtile, each poſt,
Shall ſpread it more and more.
And a wonting we will go, &c.

Theſe were the libels with whioh the defendants were charged, and the following is the form in which they were laid in the information:

That they the ſaid *Thomas Benfield*, and *John Saunders*, being ſuch perſons as aforeſaid, and moſt unlawfully, wickedly, maliciouſly, and unjuſtly deviſing, contriving, and intending (as much as in them lay) further to diſturb, moleſt, and diſquiet him, the ſaid *Daniel Cooke*, and to deſtroy his domeſtic peace and happineſs in his family, and the comfort he had in his ſaid two children, *John* and *Jane Cooke*, and to hurt and injure him the ſaid *Daniel Cooke*, in his trade and buſineſs of a grocer, which he the ſaid *Daniel Cooke*, then and there, to wit, at *Cheltenham* aforeſaid, in the county of *Glouceſter*, aforeſaid, exerciſed, and for a long time before there had exerciſed and followed with great credit and reputation, and thereby to reduce him the ſaid *Daniel Cooke*, to want and poverty; and alſo, moſt unlawfully, wickedly, maliciouſly, and unjuſtly deviſing, deſigning, contriving, and intending to traduce, ſcandalize, and vilify them the ſaid *John Cooke*, and *Jane Cooke*, ſon and daughter of the ſaid *Daniel Cooke*, being perſons of good name, fame, credit, character, and reputation, and being perſons of honeſt, chaſte, and virtuous lives, and converſations, and being then in great credit and eſteem with all the honeſt liege ſubjects of our ſaid preſent ſovereign lord the king, with whom they the ſaid *John Cooke* and *Jane Cooke*, were acquainted; and alſo moſt unlawfully, unjuſtly, wickedly and maliciouſly deviſing, deſigning, contriving and intending to repreſent, ſuggeſt, and make it be believed and thought that the ſaid *John Cooke* was a diſhoneſt, immoral, and ill-diſpoſed perſon, and that the ſaid *Jane Cooke* was a lewd, wanton, diſſolute, diſorderly, and ill diſpoſed perſon, and had been guilty of incontinency, lewdneſs, debauchery, and fornication;

tion; and alſo to make it to be believed and thought, that ſhe the ſaid *Jane Cooke* had been got with child of a baſtard, and had been delivered of a baſtard child at *London*, in order to conceal the birth thereof; and alſo deviſing and contriving moſt unlawfully and unjuſtly to hurt, and injure them the ſaid *John Cooke*, and *Jane Cooke*, in their good name, fame, credit, character, and reputation, and to expoſe the ſaid *John Cooke*, and *Jane Cooke*, to ſhame, infamy, ſcandal and diſhonour, and to bring them into diſgrace, hatred, and contempt with all the liege ſubjects of our ſaid preſent ſovereign lord the king, knowing them the ſaid *John Cooke*, and *Jane Cooke*; and the ſooner to complete, perfect, and bring to effect, their ſaid moſt unlawful, wicked, and unjuſt purpoſes aforeſaid; they the ſaid *Thomas Benfield*, and *John Saunders*, afterwards, viz. upon the 26th day of May, in the ſaid thirty-third year, of the reign of our ſaid preſent ſovereign lord the king, in the evening of the ſame day, with force and arms, at *Cheltenham* aforeſaid, in the county of *Glouceſter* aforeſaid, to wit in the public ſtreet and king's common high-way there, before and near unto the dwelling-houſe of him the ſaid *Daniel Cooke*, there ſituate, with loud voices, and in a public, open, and ludicrous manner, in the preſence and hearing of divers liege ſubjects of our ſaid preſent ſovereign lord the king, did unlawfully, wickedly, and maliciouſly ſing, ſay, ſpeak, utter publiſh, and pronounce, and did cauſe to be ſung, ſaid, ſpoken, uttered, publiſhed, and pronounced divers others falſe, ſcandalous, and malicious obſcene and libellous ſongs, verſes and matters, of and concerning the ſaid *John Cooke*, and *Jane Cooke*, greatly reflecting upon the characters and reputations of them the ſaid *John Cooke*, and *Jane Cooke:* in one of which ſaid libellous ſongs, of and concerning the ſaid *Jane Cooke*, were contained divers, falſe, ſcandalous, infamous, and malicious words, matters and expreſſions, according to the tenor following, that is to ſay, "There are two people in *Cheltenham* town; the one a luſty ſpark; they both do take delight in game; each one doth keep a park. In one there is a buck; in the other there is a doe, (meaning the ſaid *Jane Cooke:*) and if you can but favour get, a hunting you may go. But if that ſhe (meaning the ſaid *Jane Cooke)* is going proud, and like to be at rut; they turn her (again meaning the ſaid *Jane Cooke)* into a neighbour's park; and there to take the buck. And when that he has done his beſt, and this fine doe, (again meaning the ſaid *Jane Cooke)* is cloyed; then up ſhe goes to *London* town, her young one for to hide; (meaning to hide a baſtard child of her the ſaid

Jane

Jane Cooke), and when ſhe (again meaning the ſaid *Jane Cooke)*, had been there a while, if that you will but mind, then out ſhe (again meaning the ſaid *Jane Cooke)* cometh from that park, and leaves her fawn, (meaning a baſtard child of the ſaid *Jane Cooke)* behind. But yet a while in town muſt ſtay; till all things ſafe and ſound: then, home ſhe (again meaning the ſaid *Jane Cooke)* comes, to her own park to take the other round." And in one other of the ſaid libellous ſongs, of and concerning the ſaid *John Cooke*, were contained divers other falſe, ſcandalous, infamous, and malicious words, matters and expreſſions according to the tenor following, that is to ſay, "Come all you jolly wonters bold; and take a turn with me; ſuch ſport I'll ſhew, each night, (though cold,) before you ne'er did ſee; and a wonting we will go, we'll go, and a wonting we will go. My maſter *Johnny Moll*, (meaning the ſaid *John Cooke)* has got ſuch tricks enough in ſtore; his fame (meaning the fame of him the ſaid *John Cooke)* is ſpread from eaſt to weſt, on ſhutters, poſts, and doors, and a wonting we will go, &c. When night has ſpread her ſable veil, and all things ſafe and ſure, he'll (meaning the ſaid *John Cooke*, will) ſhew you tricks; he'll (again meaning the ſaid *John Cooke*, will) never fail; if you'll but nick the hour, &c. We hire men to catch our wonts; who ſteal them (meaning the wonts or moles,) when 'tis done. We love our puggs; we dearly hugg: and is not this good fun? &c. For every trap has got a trick, to make the game his own: the like was never known before, in country, city or town, &c. No begging diſh-clout e'er ſhall wipe away ſo great a blot: for all their talk, and all their balk, it will not be ſo ſoon forgot: &c. And the fame of *Johnny's Moll*, (meaning the ſaid *John Cooke)* is ſeen on every door: each yard, each gate, each ſtile, each poſt, ſhall ſpread it more and more. And a wonting we will go, we'll go, we'll go; and a wonting we will go." To the great damage, ſcandal, infamy, and diſgrace of the ſaid *Daniel Cooke*, *John Cooke*, and *Jane Cooke*; in contempt of our preſent ſovereign lord the king and his laws.

This is a ſpecimen of legal verboſity, for which, among a multitude of others, one cannot help wiſhing plain common ſenſe was ſubſtituted.

Benfield and *Saunders* were found guilty of this charge, and they moved in arreſt of judgment.

The objection taken by their counſel, was that the libel upon *John Cooke*, was diſtinct and quite different from the libel

libel on *Jane*; and that two diſtinct libels upon two diſtinct perſons cannot be laid in the ſame information.

The anſwer to this objection (and admitted by the Court) was, that in fact this was but one ſimple offence; and that ſeveral defendants may be joined in one and the ſame indictment or information, if the offence wholly ariſes from ſuch a joint act as is criminal in itſelf.

Benfield and *Saunders* were therefore left to their ſentence. What it was the Reporter does not ſtate. *The King againſt Benfield and Saunders. King's Bench, 2 Burrow's Reports*, 980, *May* 1760.

AGREEMENTS.

Validity of Agreements by Compulſion.

IF a man through fear of death or mayhem is prevailed upon to execute a deed, or do any other legal act, theſe, though accompanied with all the other requiſite ſolemnities, may be afterwards avoided, if forced upon him by a well-grounded apprehenſion of loſing his life, or even his limbs, in caſe of his non-compliance. And the ſame is alſo a ſufficient excuſe for the commiſſion of many miſdemeanors. The conſtraint a man is under in theſe circumſtances is called in law *Dureſs*, from the Latin *durities*, of which there are two ſorts; firſt, dureſs of impriſonment, where a man actually loſes his liberty; for the law ſo much diſcourages unlawful confinement, that if a man is under any dureſs of impriſonment, that is, under any compulſion by illegal reſtraint of his liberty until he ſeals a bond, or the like, he may allédge this dureſs, and avoid the extorted bond: but if a man be lawfully impriſoned, and either to procure his diſcharge, or on any other fair account, ſeals a bond or a deed, this is not dureſs of impriſonment, and he is not at liberty to avoid it. The ſecond ſpecies of dureſs is dureſs *per minas*, where the hardſhip is only threatened and impending. This is either for fear of loſs of life, or elſe for fear of mayhem or loſs of limb. And this fear muſt be upon ſufficient reaſon; "*non*," as Bracton expreſſes it, "*ſuſpicio cujuſlibet vani et meticuloſi hominis, ſed talis qui poſſit cadere in virum conſtantem; talis enim debet eſſe metus, qui in ſe contineat vitae periculum, aut corporis cruciatum.*" A fear of battery or being beaten,

beaten, though ever ſo well grounded, is no dureſs; neither is the fear of having one's houſe burned, or one's goods taken away and deſtroyed; becauſe, in theſe caſes, ſhould the threat be performed, a man may have ſatisfaction by requiring equivalent damages; but no ſuitable atonement can be made for loſs of life or limb. 1 *Black. Com.* 130, 137.

But although nothing but the danger of injury to perſon or liberty is admitted in a Court of Law to be a legal excuſe in order to avoid a contract entered into with legal ſolemnities, yet a Court of Equity would relieve the party from the performance of ſuch contract if the circumſtances amounted to ſuch a degree of oppreſſion or impoſition as would render a completion of it inequitable or unconſcionable.

The following caſe affords a ſingular inſtance of dureſs, which would have avoided the contract made under it, but a ſubſequent confirmation of the contract when there was no dureſs was conſidered as ſufficient to bind the party.

A man was caught in bed with another man's wife, and the huſband, who caught him, having a ſword in his hand, was about to kill the man, who was naked, and in the power of the huſband; but upon the man's deſiring the huſband not to take that advantage of him, and ſaying that he would make him reparation, they went into another room, where the man gave the huſband a note for 100l. payable at a certain time.

The firſt queſtion therefore is, whether the note given under ſuch circumſtances of dureſs is good and the money recoverable?

When the money on the note became due, the huſband came for payment, and the man not then having the money gave his bond for the payment of the 100l.

After all this he applied to the Court of Chancery to be relieved from the payment of this bond.

The ſecond queſtion then is, whether, if the note be bad, this bond, given without any circumſtances of dureſs, ſhall be good and the money thereon recoverable?

Lord *Cowper* declared, that if the matter had reſted on the note, which was gained by a man armed from one naked, and by dureſs, though it happened to be given in ſatisfaction for the greateſt injury, (in which caſe, however, the utmoſt remedy the law would have given him had been damages to be aſcertained by a Jury,) he ſhould have made

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no difficulty of granting relief; but when afterwards the plaintiff had coolly, and without any pretence of fear or dureſs, entered into a bond to the huſband, he had thereby aſcertained the damages, and ought not to be relieved. *Court of Chancery*, 3 *Peere Williams Reports*, 294.

We have obſerved that when the circumſtances altogether amount to ſuch a degree of oppreſſion and impoſition as to render the completion of a contract inequitable and unconſcionable, a Court of Equity would relieve the party from the performance of it, although in point of law the circumſtances would not have amounted to dureſs.

In the following caſe there are many circumſtances of apparent oppreſſion, but the Court of Chancery did not think them a ſufficient ground to ſet aſide the contract; however, the party was relieved on other grounds ſtated by the Lord Chancellor.

In 1729 *Roy* was apprehended for carrying a gun in the Duke of *Beaufort*'s manor by *Marks* the gamekeeper. He was taken by *Marks* before a Juſtice of Peace that lived fifteen miles from the place, although there were ſeveral neighbouring Juſtices within three miles. When there, *Roy* was threatened with being entirely ruined by the Duke if he did not give ſecurity never to offend again. Under this proſecution *Roy* conſented to the propoſal, and he and his father were jointly bound in a bond in the penalty of 100l. that *Roy* the ſon ſhould not again treſpaſs on the Duke's royalty by ſhooting, hunting, fiſhing, &c. unleſs with licence of the gamekeeper, or in company with a qualified perſon: after which that proſecution dropped.

In the year 1732, three years after giving this bond, two of the Duke's ſervants, one of them brother-in-law to *Marks* the gamekeeper, aſked *Roy* the ſon to go with them, and divert himſelf with fiſhing. He went, and they angled about two hours in a navigable river, and catched two flounders. This circumſtance was not noticed until two years afterwards, when theſe very ſervants were proſecuted for a riot; and they were convicted on the evidence of *Roy*'s father. *Roy* the ſon was at this time dead. Immediately after this the bond was put in ſuit againſt the father, in which he was jointly bound, on account of his ſon having caught two flounders in the Duke's royalty two years before. The Duke of *Beaufort* obtained a verdict againſt him for 100l. the penalty in the bond, and 40l. coſts of ſuit.

Roy

Roy the father, thinking himſelf aggrieved and oppreſſed by the verdict, applied by bill to the Court of Chancery; when the Lord Chancellor decreed as follows:

The firſt general queſtion is, whether the bond was obtained by oppreſſion, and by the impoſition of the Duke of *Beaufort*'s ſervants?

Secondly, ſuppoſing there is no evidence of ſuch impoſition, whether the bond will be conſidered only as a ſecurity that the ſon ſhould not poach for the future?

Thirdly, whether an ill uſe was made of this bond?

As to the firſt head of relief, oppreſſion and impoſition, I am of opinion there is no evidence of either which ought to induce the Court to relieve.

Roy's ſon appears to have been a perſon who made a practice of carring a gun, and likewiſe was warned ſeveral times by *Marks* the gamekeeper not to come into the Duke's manor. Afterwards *Marks*, being upon his lawful buſineſs, finds this young man with a gun in his hand, and might have juſtified ſeizing the dog; and though he ſhot him it does not make any great alteration, becauſe if any body has ſuffered the Duke has, who loſt the benefit of the dog, which ſhould have been ſecured to his own uſe. The carrying a gun, and ſhooting the keeper's dog, in return for his own being killed, was a ſufficient juſtification of *Marks* for taking *Roy*'s ſon before a Juſtice of Peace.

As to the point of taking him before a Juſtice of Peace who lived at the diſtance of fifteen miles, it is not a thing to be commended; but, however, that does not prevent his having equal juriſdiction as if he had lived in the neighbourhood: it appears, beſides, that *Roy*'s ſon had more aſſiſtance at *Wincheſter* than he would have had in any other part of the country, for he had the Recorder for his counſel; and it is very probable the gamekeeper had an eye to having counſel himſelf, or he would not have thought of carrying him ſo far.

No evidence has been attempted to be given of the Juſtice of Peace miſbehaving in the affair; on the contrary, he was ſo favourable as not to levy the penalty of 5l. which the ſtatute gives againſt a perſon carrying a gun, being unqualified; nor was there any notice taken of killing the Duke's dog: and, however trifling it may be called, if ſuch a thing had come before me at *niſi prius* before a Jury, on the inſolent behaviour of the perſon at the time he ſhot the dog, and other circumſtances, I ſhould have made no ſcruple of directing very conſiderable damages.

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As Counſel appear to have been preſent the whole time before the Juſtice of Peace, though it is not ſaid they adviſed the bond, yet I muſt preſume they did, as nothing is ſhewn to the contrary.

Bonds taken for the preſervation of the game, and to prevent poaching, are not only for the benefit of lords of manors, but even of the young perſons who enter into them, as this ſort of idleneſs generally leads them to worſe conſequences.

As to oppreſſion, if there had been any illegal advantage taken whilſt he was in cuſtody before the Juſtice of Peace, he might have been relieved at Law, and there was no occaſion for a ſuit in Equity.

But there could be none here, becauſe his being before a Juſtice of Peace was lawful, nor was there any improper method uſed to draw him into the executing of this bond.

The Counſel for *Roy* have inſiſted it is an exceſſive penalty, and to be ſure it is a large one; but I do not know that Courts of Equity, where a bond is entered into voluntarily, have gone ſo far as to take into their conſideration the greatneſs or ſmallneſs of the penalty. I ſhall be extremely cautious how I give an opinion that will ſet aſide ſuch bonds, which, if rightly uſed, may be of great ſervice in the preſervation of the game, and of equal benefit to the obligors themſelves in taking them out of an idle courſe of life, which poaching naturally leads them into.

As to the head of ſecurity, it is moſt abſurd to think that bonds of this kind were intended merely as a ſecurity, and that nothing is to be recovered upon them.

I am of opinion, when theſe ſort of bonds are given by way of ſtated damages between the parties, it is unreaſonable to imagine they could only be intended as a bare ſecurity that the obligor ſhould not offend for the future. Was this the caſe, in what reſpect is a gentleman in a better condion, who has ſuch a bond, than he was before, if, after he has obtained judgment at law, a Court of Equity will give him no other ſatisfaction than the bare value of the price of the game that is killed.

Theſe two heads of relief, may therefore be laid out of the caſe.

The third is the moſt material conſideration, and that is the ill uſe which has been made of the bond. No evidence has been offered to ſhew that *Roy*'s ſon ever has been guilty of ſhooting, fiſhing, hunting, &c. from the time of giving the bond in 1729, till May, 1732; after the fact of catching the two flounders, which muſt be admitted to be a breach,

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it reſts for two years, and no action was brought upon the bond; then it appears that *Roy* here was a witneſs in an information for a riot tried at *Wincheſter* Aſſizes in Trinity Term 1734, where the Duke's two ſervants were convicted, and chiefly on *Roy*'s evidence.

It is a very material circumſtance that *Roy*'s ſon had a licence, or at leaſt an encouragement to fiſh, by being in company with two of the Duke's ſervants, one of whom was brother-in-law to *Marks* the gamekeeper.

It frequently happens there may be a juſt cauſe of an action, yet the real motives may be very unjuſt, which a Court of Equity will always take into their conſideration, though they cannot at Law pay any attention to it.

It appears by the evidence, that *Marks*, who was the game-keeper, who had the authority of the duke, who has been a witneſs of the tranſaction of the bond, gave a licence, or at leaſt an encouragement to this fiſhing, which, as it was with an angling rod only, could not be called poaching, nor was it ever ſo eſteemed.

Beſides, in ſuch a tract of time as two years, it is impoſſible to ſuppoſe, *Marks*, the game keeper, could be ignorant of this fiſhing, eſpecially as his own brother-in-law was in company.

According to the condition of this bond *Roy* could not be relieved at law, becauſe his ſon could not fiſh without expreſs leave from the game-keeper, or in preſence of a qualified perſon; ſo that if the duke of *Beaufort* himſelf had given leave, there muſt at law have been a verdict againſt *Roy*, becauſe it is not within the expreſs terms of the condition of the bond.

Now when a man has made this moderate uſe of his liberty of fiſhing, and manifeſtly appears to have had leave, it would be hard not to relieve againſt the judgment, and penalty recovered upon this bond at law.

I do therefore decree, that *Roy* be relieved againſt this verdict, and that the *Duke* of *Beaufort*, refund the 100l. recovered at law upon the bond, and alſo 40l. damages: and each to bear their own coſts in this Court. *Roy* v. *Duke* of *Beaufort*, Court of Chancery, 2 *Atkins Reports*, 109, 5 July, 1714.

Validity of AGREEMENTS *impoſſible to be performed.*

THORNBOROW agreed to give *Whitacre* 5l. viz. 2s 6d in hand, and the remaining 4l 17s 6d on *Whitacre's* perform-

ing his part of the agreement, which was, that he ſhould deliver to *Thornborow*, two grains of rye corn on Monday the 29th of March, four grains on Monday next following, eight on Monday next, after the Monday laſt mentioned, ſixteen grains on Monday next after the third Monday; and ſo on every other Monday, he ſhould deliver twice the number he delivered on the preceding Monday, for one whole year. This agreement not being performed, *Thornborow* brought his action to recover damages, and the queſtion was, whether in point of law an action could be maintained for the non-performance of ſuch a contract.

That the action was not maintainable, it was contended that the agreement appeared upon the face of it to be impoſſible; the rye to be delivered, amounted to ſuch a quantity, as all the rye in the world was not ſo much, and being impoſſible, was void, and *Whitacre* not bound to perform it. That there were three ſorts of impoſſibilities; *impoſſibilitas legis*, ſuch are all immoral actions; as to murder a man. Secondly, *impoſſibilitas rei*, ſuch as are all natural impoſſibilities, which cannot be done from the nature of the thing. Thirdly, *impoſſibilitas facti*, viz. ſuch an impoſſibility, as though there is nothing in the nature of it impoſſible to be done, yet it is impoſſible for a man to do; as to go to *Rome* in a day. And a covenant or condition to do any of theſe impoſſibilities is void. And the caſe of *Litt.* Sect. 129, was mentioned, where, on the death of a tenant, the lord is intitled to a buſhel of roſes; now, if the tenant die in winter, the lord ſhall not diſtrain for his roſes, till the ſeaſon that the roſes come; becauſe *lex non cogit ad impoſſibilia;* and the law takes notice that the roſes cannot be kept, but otherwiſe of wheat, &c. which may. Note alſo, theſe other caſes, 40 *Edw.* III. 6. *a. per Finchden*, if a man be bound by his deed to do things which cannot be done by impoſſibility (although it was his folly) yet the deed is void; but a man is liable to do as far as can be done by the power of a man. And the principal caſe there which is alſo cited, 1 *Co.* 98. *a.* and abridged *Fitz. Cov.* 16, and is put in *Perkins*, *Sect.* 738, that if a leaſe be made of a wood, and the leſſee covenants to leave the wood in as good plight as it was at the time of the leaſe made, and during the term the wood is blown down by a ſudden tempeſt, the leſſee ſhall not have an action of covenant: otherwiſe in caſe of a like covenant upon a leaſe of a houſe, and the houſe is blown down by a tempeſt during the term. For in the laſt caſe, it is in the leſſee's power to leave the houſe in as good plight as it was at the time of the demiſe; and for

that reaſon, though it was blown down by a tempeſt[a], yet the leſſee muſt rebuild it, becauſe it was his own agreement; but in the firſt caſe it is impoſſible, becauſe the leſſee cannot make the trees grow again as they were before; and therefore by reaſon of the impoſſibility he is excuſed from his covenant. C. L. 206. b. a bond, conditioned that if the obligee go from *Weſtminſter* to *Rome*, within three hours, that the bond ſhall be void, the bond is abſolute and the condition void. So of a fecoffment with the like condition.

By the Court. Suppoſe A. for money paid him by B. will undertake to do an impoſſible thing, ſhall not an action lie againſt him for not performing it? as in caſe of a bond with ſuch an impoſſible condition, the bond is abſolute. So where a man will, for a valuable conſideration, undertake to do an impoſſible thing, though it cannot be performed, yet he ſhall anſwer damages.

And as to the impoſſibility, it was only impoſſible with reſpect to *Whitacre's* ability, which was not ſuch an impoſſibility as would make the contract void. And the Chief Juſtice ſaid, the words, *quolibet alio die Lunæ*, muſt be conſtrued what we ſay in *Engliſh*, every other Monday, that is every next Monday but one, and that would bring the contract nearer to *Whitacre's* ability of performance. And he ſaid, that *impoſſibilitas rei et facti* were all one.

Powell, *J.* ſaid, that though the contract was a fooliſh one, yet it would hold in law, and that *Whitacre* ought to pay ſomething for his folly. Upon this occaſion, the caſe in 1 *Lev.* iii. *Keb.* 569, *James* v. *Morgan*, was remembered, which was an agreement to pay for a horſe, a barley corn, a nail, for every nail in the horſe's ſhoes, and double every nail, which came to 500 quarters of barley; and at a trial before *Hide*, Chief Juſtice, the Jury gave the plantiff the [b] value of the horſe in damages, and he had his judgment: which caſe was admitted of all hands to be good law, and it governed this caſe.

The Counſel for the defendant *Whitacre*, here obſerved, that that differed from this caſe, becauſe that was poſſible to be performed, though it was an ill bargain, but this impoſſible. But perceiving the Court to be againſt *Whitacre*, they offered to *Thornborow* his half crown and his coſts, which was accepted of, and ſo no judgment was given in the caſe.

[a] Acc. Dyer, 33. a. Pl. 10. vid. Al. 26. 2 Raym. 1477. Com. 627. 1 T. R. 310.

[b] 1 Vent. 269. 1 Wils. 295.

Thornborow v. *Whitacre*, Court of *King's-Bench*, 2 *Raymond's Reports*, 1164. A. D. 1705.

A man therefore, who for a valuable conſideration, undertakes to do what is impoſſible to be done, ſuch an impoſſibility is no excuſe in point of law, for his not performing it, and he is liable to pay damages[a].

PHYSICIANS.

Whether their Fees be recoverable by Law.

THE plaintiff, Doctor *Chorley*, who was a phyſician, living at *Doncaſter*, brought an action to recover his fees from *Bolcat* the defendant, who was the executor of a man whom the doctor had attended a conſiderable time, and who lived at ſome little diſtance from the town; the evidence was, that at *Doncaſter* and its neighbourhood there was no certain rule about fees, but the general practice was, for a phyſician to receive two guineas a week for his attendance. The plaintiff obtained a verdict at the laſt aſſizes at *York*.

Wood on the behalf of *Bolcat*, the executor, moved the Court to ſet aſide the verdict, on the ground that no action lay for a phyſician's fees any more than for a barriſter's.

Cockell, Serjeant, and *Chambre*, in ſupport of the verdict argued, that though this point had been ruled ſeveral times at *niſi prius*[b] againſt ſuch a claim, yet it had never been ſolemnly decided, nor was there any authority in the books for putting the claim of a phyſician's fee upon the ſame footing as thoſe of a barriſter. In the latter caſe it might originally have been proper, that no temptation ſhould be held out to countenance injuſtice; but in the former it would be equally impolitic that thoſe who are frequently put to expence in attending patients at a diſtance, and who are liable to make reparation to thoſe who may ſuffer by their want of ſkill, ſhould not be certain of a juſt and honourable reward.

[a] On the ſame principle as *Wall* and *Grovet*, ante 93.

[b] See page 83, note [*].

ward. The regulation with regard to barriſters, is founded on the grounds of public policy, as appears by the paſſage in *Tacitus*, to which Mr. Juſtice *Blackſtone*,[a] refers; but they are totally inapplicable to the caſe of phyſicians. And in that very paſſage in *Tacitus*, it is taken for granted that the latter were entitled to a remuneration, becauſe their ſituation was diſſimilar to that of advocates. Beſides in this caſe there is an additional reaſon why the plaintiff ſhould recover, as there is underſtood to be a general ſtipulated acknowledgment for a phyſician's attendance at the place where this tranſaction aroſe.

Lord *Kenyon*, Chief Juſtice. I remember a learned controverſy ſome years ago, as to what deſcription of perſons were intended by the *Medici* at *Rome*: and it ſeemed to have been clearly eſtabliſhed by Dr. *Mead*, that by thoſe were not meant phyſicians, but an inferior degree amongſt the profeſſors of that art, ſuch as anſwer rather to the deſcription of ſurgeons amongſt us. But at all events it has been underſtood in this country, that the fees of a phyſician are honorary, and not demandable of right. And it is much more for the credit and rank of that honourable body, and perhaps for their benefit alſo, that they ſhould be ſo conſidered. It never was yet heard of, that it was neceſſary to take a receipt upon ſuch an occaſion. And I much doubt they themſelves would not altogether diſclaim ſuch a right as would place them upon a leſs reſpectable footing in ſociety than that which they at preſent hold. The Judgment was therefore arreſted, and Dr. *Chorley* gained nothing by his verdict. *Chorley againſt Bolcat executor, King's-Bench, 3 Durnford and Eaſt's Reports*, 317. 30 June, 1791.

TORTURE.

[a] It is eſtabliſhed with us, that a counſel can maintain no action for his fees; which are given, not as *locatio vel conductio*, but as *quiddam honorarium*; not as a ſalary or hire, but as a mere gratuity, which a counſellor cannot demand without doing wrong to his reputation: as is alſo laid down with regard to advocates in civil law, whoſe *honorarium* was directed by a decree of the ſenate, not to exceed in any caſe 10,000 ſeſterces, or about 80l. of *Engliſh* money. Tac. Ann. l. 11. 3 *Black. Comm.* 28.

TORTURE.

THE *rack* or *queſtion*, to extort a confeſſion from criminals, is utterly unknown to the law of *England*; though once when the dukes of *Exeter* and *Suffolk*, and others, miniſters of *Hen.* VI. had laid a deſign to introduce the civil law into the kingdom, as the rule of government, for a beginning thereof they erected a rack for torture; which was called in deriſion the Duke of *Exeter's* daughter, and ſtill remains in the tower of *London*; where it was occaſionally uſed as an engine of ſtate, not of law, more than once in the reign of queen *Elizabeth*. But when, upon the aſſaſſination of *Villiers*, Duke of *Buckingham*, by *Felton*; it was propoſed in the privy council to put the aſſaſſin to the rack, in order to diſcover his accomplices; the judges, being conſulted, declared unanimouſly, to their own honour, and the honour of the *Engliſh* law, that no ſuch proceeding was allowable by the laws of *England*. It ſeems aſtoniſhing that this uſage of adminiſtering the torture, ſhould be ſaid to ariſe from a tenderneſs to the lives of men: and yet this is the reaſon given for its introduction in the civil law, and its ſubſequent adoption by the *French*, and other foreign nations: viz. becauſe the laws cannot endure that any man ſhould die upon the evidence of a falſe, or even a ſingle witneſs, and therefore contrived this method, that innocence ſhould manifeſt itſelf by a ſtout denial, or guilt by a plain confeſſion. Thus rating a man's virtue by the hardineſs of his conſtitution, and his guilt by the ſenſibility of his nerves!—but there needs only to ſtate accurately, in order moſt effectually to expoſe this inhuman ſpecies of mercy:[a] the uncertainty of which, as a teſt and criterion of truth, was long ago very elegantly pointed out by *Tully*. Though he lived in a ſtate wherein it was uſual to torture ſlaves, in order to furniſh evidence: "*tamen*," ſays he, "*illa tormenta gubernat dolor, moderatur natura cujuſque tum animi tum corporis, regit*

[a] The Marquis *Beccaria*, (ch. 16.) in an exquiſite piece of raillery, has propoſed this problem, with a gravity and preciſion that are truly mathematical: "the force of the muſcles and the ſenſibility of the nerves of an innocent perſon being given, it is required to find the degree of pain, neceſſary to make him confeſs himſelf guilty of a given crime."

regit quaeſitor, flectit libido, corrumpit ſpes infirmat metus: ut in tot rerum anguſtiis nihil veritati loci relinquatur. 4 *Black. Comm.* 325.

The ſtatute, Will. III, c. 8. ſec. 2. for regulating of trials in caſes of treaſon, enacts that no perſon ſhall be tried or attainted of high treaſon, but upon the oaths of two witneſſes; unleſs the party indicted, ſhall *willingly, without violence*, in open Court confeſs the ſame.

Foſter, in his diſcourſe of high treaſon, 244 ſays, the wording of this clauſe touching confeſſions: "unleſs the party ſhall *willingly and without violence* confeſs the ſame," ſuggeſteth a matter which I will juſt mention. The common law knew of no ſuch engine of power as the rack, or torture to furniſh the crown with evidence out of the priſoner's mouth againſt himſelf, or other people. It was, as Lord *Coke* informeth us, firſt brought into the tower by a great miniſter in the time of *Hen.* VI. directly, ſaith he, againſt law, and cannot be juſtified by any uſage. But in fact it was practiſed, though I believe ſparingly, and never, ſaith king *James*, but in caſes of high treaſon, for more than a century afterwards.

At the trial of the Earls of *Eſſex* and *Southampton*, the Attorney General *Coke*, extolleth the great clemency of her majeſty towards the conſpirators that none of them were put to the rack or torture; and acknowledgeth the goodneſs of God towards her, and his juſt judgment upon the priſoners, that the truth had been revealed by the witneſſes without rack or torture of any of them: a ſtrain of adulation, to ſay no worſe of it, nauſeous and ſordid, highly unbecoming a gentleman of the profeſſion, eſpecially one who well knew, and hath informed his readers, that any kind of torture in that caſe would have been utterly illegal. When *Felton* upon his examination at the council board declared, as he had always done; that no man living had inſtigated him to the murder of the Duke of *Buckingham*, or knew of his intention: the biſhop of *London* ſaid to him, "If you will not confeſs you muſt go to the rack." The man replied, "If it muſt be ſo, I know not whom I may accuſe in the extremity of the torture, biſhop *Laud*, perhaps, or any lord at this board." Sound ſenſe in the mouth of an enthuſiaſt and a ruffian. *Laud* having propoſed the rack, the matter was ſhortly debated at the board, and it ended in a reference to the Judges; who unanimouſly reſolved that the rack cannot be legally uſed.

MARRIAGE.

MARRIAGE.

Of inceſtuous Marriages.

IN general, all perſons are able to contract themſelves in marriage, unleſs they labour under ſome particular diſabilities. Among theſe diſabilities are conſanguinity, or relation by blood; and affinity, or relation by marriage. Theſe diſabilities are canonical, and are either grounded upon the expreſs words of the divine law, or are conſequences plainly deducible from thence: it therefore being ſinful in the perſons who labour under them, to attempt to contract matrimony together, they are properly the object of the eccleſiaſtical magiſtrate's coercion; in order to ſeparate the offenders, and inflict penance for the offence, *pro ſalute animarum.* But ſuch marriages not being void *ab initio*, but voidable only by ſentence of ſeparation, they are eſteemed valid to all civil purpoſes, unleſs ſuch ſeparation is actually made during the life of the parties. For after the death of either of them, the Courts of common law will not ſuffer the Spiritual Court to declare ſuch marriages to have been void; becauſe ſuch declaration cannot now tend to a reformation of the parties. Theſe canonical diſabilities being entirely the province of the eccleſiaſtical Courts, our books are perfectly ſilent concerning them. But there are a few ſtatutes, which ſerve as directories to theſe courts, of which it will be proper to take notice. By ſtatute 32 *Hen.* VIII. c. 38. it is declared, that all perſons may lawfully marry, but ſuch as are prohibited by God's law: and (becauſe in the times of popery a great variety of degrees of kindred were made impediments to marriage, which impediments might however be bought off for money) it is declared by the ſame ſtatute, that nothing (God's law excepted) ſhall impeach any marriage, but within the *levitical degrees*; the fartheſt of which is between uncle and niece.

In the following caſe, it was a queſtion whether a man may after his wife's death, marry her ſiſter.

Thomas Hill married *Elizabeth Clark*, and for ſeveral years cohabited with her as man and wife; after her death he married

married her ſiſter *Sarah Clark*. Proceedings were commenced againſt *Hill* and his wife in the Spiritual Court, for an inceſtuous marriage. They applied to the Court of Common Pleas for a *prohibition*[a], and the queſtion was, whether the marriage of a man with his wife's ſiſter was inceſtuous; if not, that the Spiritual Court ſhould be prohibited from proceeding againſt the parties.

The reſolution of the Court, was given by Chief Juſtice *Vaughan*, who ſaid, the Temporal Courts could not prohibit the Spiritual Courts, from proceeding againſt the parties for inceſt in this marriage, and then he ſtated the three following aſſertions.

1. That this marriage was expreſsly prohibited within the eighteenth of *Leviticus*, and then muſt be within the *levitical degrees*.

2. If not ſo prohibited, yet, that it was not a marriage without the *levitical degrees*; and conſequently muſt be within them.

3. That if it was a marriage without the *levitical degrees*, ſtill it was a marriage prohibited by God's law, the words of the ſtatute 32 *Henry* VIII. being, No marriage (God's law excepted) ſhall be impeached without the *levitical degrees*.

The Chief Juſtice then proceeded as follows.

As to the firſt aſſertion. When a law is given to any people, it is neceſſary that it be conceived in words which may be underſtood, for without that the law cannot be obeyed; and a law that cannot be obeyed, is no law.

2. The meaning of words in any law are to be known, either from their uſe and ſignification, according to common acceptation

[a] A *prohibition* is a writ iſſuing out of the king's Superior Courts directed to the judge and parties of a ſuit in any inferior Court, commanding them to ceaſe from the proſecution thereof: if the reaſons alledged by the party applying for this writ, appear to the Court to be ſufficient, the writ of prohibition immediately iſſues; commanding the Judge not to hold, and the party not to proſecute the plea. But ſometimes the point may be too nice and doubtful to be decided merely upon a motion: and then for the more ſolemn determination of the queſtion, the party applying for the prohibition is directed to declare in prohibition, which brings the queſtion to be argued before the Court; after which the writ of prohibition either on the one hand is granted, or on the other, if the Superior Court ſhall think it no competent ground for reſtraining the inferior juriſdiction, a writ of *conſultation* is awarded, ſo called becauſe upon deliberation and conſultation had, the judges find the prohibition to be ill founded, and therefore by this writ they return the cauſe to its original juriſdiction, to be there determined in the inferior Court.

acceptation before the law made, or from ſome law or inſtitution declaring their ſignification.

3. The interdicts of marriage and carnal knowledge in the *levitical law* were directed formally to the men, not to the women, who are interdicted but by conſequent; for marriage and carnal knowledge being a reciprocal act, and impoſſible to be done by one party, it follows that the woman being interdicted to the man, the man muſt alſo conſequently be interdicted to the woman, for a man cannot marry a woman, and ſhe not marry him.

4. The reaſons why the interdict is ever formally to the man, are, 1. Becauſe in the prohibited act of uncovering the nakedneſs, the man properly is the primary agent, and the woman but patient and conſenting; for a woman can no more uncover the man's nakedneſs naturally, than ſhe can raviſh him. 2. The man, after marriage, hath the deduction of the woman, *ad domum & thalamum*, and all the civil power over her, and not ſhe over him; but the woman's conſent to have her nakedneſs uncovered is forbid, and makes her conſenting an equal offence with the man's; for by *Lev.* xx. the man and woman offending in that kind were to die, which had not been but that both were tranſgreſſors.

5. The firſt and moſt expreſs law prohibiting the carnal knowledge of certain perſons, *Lev.* xviii. 6. is, "None of you ſhall approach to any that is near of kin to him, to uncover their nakedneſs."

6. Near of kin, are words of relation, and have no poſitive certainty, nor are intelligible, but relatively to remoter kin; all the poſterity of *Adam* being of kin in ſome degree;

A perſon of kin to a man within two degrees, is nearer of kin than one within four degrees; and one within four degrees nearer than one within eight degrees; and ſo interminately.

Whence it follows, that the law before cited, "not to approach to any near of kin, to uncover their nakedneſs, had been uſeleſs, without knowing the perſons accepted and accounted to be the near of kin.

Thoſe perſons were known to the *Jews*, to whom the law was given by the law itſelf declaring them preciſely.

The words are, "there ſhall none be defiled for the dead among his people, but for his kin that is near unto him; that is, for his mother, and for his father, and for his ſon, and for his daughter, and for his brother, and for his ſiſter, *Lev.* xxi. 1, 2." And without this declaring law, it is evi-

dent

dent that theſe perſons are a man's next of kin, in the aſcending, and deſcending, and in the collateral line. And they which are next of kin to him muſt be a man's near kin neceſſarily, although others more remote may be alſo denominated a man's near kin by cuſtom of ſpeech.

Upon this foundation all the prohibitions concerning inceſtuous marriages, are grounded by *Lev.* xviii.

The firſt and moſt general *levitical prohibition* in that kind, is in the ſame words as this law, prohibiting being defiled for the dead, but for a man's kin, that is near unto him.

None of you ſhall approach to any that is near of kin to him, to uncover their nakedneſs. And afterwards inſtances are given of the perſons comprehended under thoſe words, near of kin, as is done in the other law concerning the dead.

As in the father, the brother, the ſon, whoſe nakedneſs appears to conſiſt and terminate in their wives: for a man cannot otherwiſe uncover the nakedneſs of a man but in his wife, which is the man's nakedneſs, as appears in the text; and thoſe are three of the perſons comprehended under the words near of kin.

"The nakedneſs of thy father ſhalt thou not uncover," which is explained as before in the next verſe, "The nakedneſs of thy father's wife ſhalt thou not uncover: it is thy father's nakedneſs, *Lev.* xviii. 7, 8.

"Thou ſhalt not uncover the nakedneſs of thy daughter in law, ſhe is thy ſon's wife," *ib.* 15.

"The nakedneſs of thy brother's wife ſhalt thou not uncover; it is thy brother's nakedneſs," *ib.* 16.

Which is the ſame as to ſay, thy father, thy brother, thy ſon, are thy near of kin, therefore thou ſhalt not uncover their nakedneſs by uncovering the nakedneſs of their wives.

Then as to the nakedneſs of the females terminating in their own perſons.

"The nakedneſs of thy mother ſhall thou not uncover, ſhe is thy mother," *ib.* 7. "The nakedneſs of thy ſiſter, the daughter of thy father, or the daughter of thy mother, thou ſhall not uncover," *ib.* 9: which is to ſay, thy mother and ſiſter are thy near of kin, therefore ſhalt thou not uncover their nakedneſs. So expreſs inſtances are made in five of the ſix ſorts of perſons declared to be near of kin.

But no inſtance is made in the daughter, though ſhe be as immediately as the ſon near of kin to the father, and eminently comprehended under that law of not approaching to a man's near of kin, and by all both reaſon and expoſition within it; which made Sir *Edward Coke*, *Coke's* Inſt. 2. 683. by miſtake in his table of prohibited marriages in his comment

ment upon the ſtatute of 32 *Hen.* VIII. to ſet down the daughter as nominally prohibited by *Lev.* xviii. and then in the margin to ſay, thoſe degrees are truly ſet down in the ſtatutes of 25 and 28 *Hen.* VIII. whereas the daughter is mentioned in neither of them, nor in *Lev.* xviii.

The uſe I make of this, is to ſhew, that the extent of the prohibiting law is not to be meaſured from the perſons inſtanced in *Lev.* for ſhould it be ſo eſtimated, the law would be narrower than itſelf, the inſtances comprehending only five prohibited perſons: but the clauſe of not approaching to a man's near of kin comprehending ſix, and ſo the law would be inconſiſtent with itſelf.

The ſecond general law. Beſides thoſe ſix degrees of perſons before mentioned, who are paſt queſtion a man's next of kin, and conſequently his near of kin, and declared by the *levitical law* ſo to be, there are other degrees of kin prohibited, which are alſo undoubtedly a man's next of kin after the former ſix kinds, and are denoted alſo in *Lev.* as a man's near kin; and who are inſtanced as, and indeed are, the next, and ſo the near of kin to a man's near of kin, as before, and prohibited for that reaſon, beyond which kindred no prohibition is found in *Leviticus.*

Whence a ſecond general law is deduced from *Lev.* xviii. "That no man ſhall diſcover their nakedneſs who are the near of kin to his near of kin, or of them who are *propinqui propinquis ſuis,*" which they draw from theſe words,

"Thou ſhalt not uncover the nakedneſs of thy father's ſiſter, ſhe is thy father's near kinſwoman. Nor of thy mother's ſiſter, for ſhe is thy mother's near kinſwoman. Nor of thy father's brother, which muſt be for the ſame reaſon, he being his father's near kinſman. Nor of thy ſon's daughter, or of thy daughter's daughter," *Lev.* xviii. 12, 13, 14, 10. for the like reaſon, they being near of kin to his ſon and daughter, as his ſon and daughter are to him.

All which are inſtanced in *Leviticus,* as prohibited for that reaſon, and many others are of the ſame relation not inſtanced as, "a man's mother's brother, his father's father, his mother's father, his father's mother, his mother's mother, his brother's daughter, his ſiſter's daughter, and others who are equally near of kin to his near of kin, as his immediate near of kin are to himſelf, and were never doubted to be prohibited within the *levitical degrees* by any.

Whence alſo it appears, that the inſtances given in this ſecond rule drawn out of *Leviticus,* are not the law itſelf, nor comprehend the extent of it, but are examples only of another, or ſecond degree of kindred, comprehended under the

the general law of not approaching to thoſe near of kin, and which are particularly ſpecified by the *Karait* rabbies.

That all perſons near of kin ſtrictly, to any of the ſix perſons firſt interdicted, are likewiſe interdicted by that law, "None ſhall approach to any near of kin to him to uncover their nakedneſs," within the meaning of the words, near of kin, is further proved by theſe reaſons:

1. When the law hath denominated the relations to be accounted near of kin, (as is done in this caſe,) none compriſed under that denomination can be more or leſs near of kin than others ſo denominated. As when the law denominates a man an Attorney, Serjeant, or the like, no Attorney is more or leſs an Attorney, and no Serjeant more or leſs a Serjeant, than any other Attorney or Serjeant. And ſo it is in all orders of men of the ſame denomination.

Therefore it appearing by the law to be the reaſon of interdicting a perſon becauſe near of kin to a man's father or mother, and none of thoſe ſix relations being more or leſs near of kin than the other, the nearneſs of kin to any of them is as much reaſon of interdicting as the nearneſs of kin to the father or mother, or any other of them inſtanced.

Another reaſon is, becauſe the law forbidding the approach to any near of kin forbids in that expreſſion the near of kin to any of the ſix perſons ſtrictly denominated near of kin, as well as thoſe ſix perſons themſelves; for in *Leviticus* a man is interdicted his wife's daughter, and his wife's ſon's daughter, and her daughter's daughter, becauſe they are his wife's near kinſwomen, whereas her daughter only is the near kinſwoman to the wife in the ſtricteſt ſenſe, and the other but near of kin to her near of kin, that is, to her daughter; yet all of them are ſaid to be the wife's near kinſwomen. So, Thou ſhalt not uncover the nakedneſs of thy mother's or father's ſiſter, for he uncovereth his near kin, *Lev.* xx. 19. before they were ſaid to be the near kin to the mother and father, and here to be the ſon's near kin.

The third general law. The third prohibiting rule drawn out of *Leviticus* is, A man is prohibited to take a wife, and any other near of kin to her, which is grounded upon theſe words, "Thou ſhalt not uncover the nakedneſs of a woman and her daughter; neither ſhalt thou take her ſon's daughter, or her daughter's daughter, to uncover their nakedneſs, for they are her near kinſwomen. *Lev.* 18. 17.

None of the wife's near kinſwomen are here clearly inſtanced but her daughter, not her mother, not her ſiſter, who are equally her near kinſwomen, and compriſed in this prohibition,

prohibition, and in the reaſon of it, as well as the daughter: for the reaſon of prohibiting theſe perſons inſtanced in being, becauſe they are the wife's near kinſwomen, it is evident that the wife's mother and the wife's ſiſter are by the ſame reaſon prohibited, for they are her near kinſwomen in the ſtricteſt ſenſe of nearneſs.

His wife's daughter is literally forbidden the huſband, and ſo is (but not ſo obviouſly) his wife's mother. For example,

If he marry the mother, the words forbid him her daughter; and if he marry the daughter, he is prohibited the mother; elſe he would marry a woman and her daughter, which the words forbid; and accordingly by the *Karaits* doctrine, grounded upon clear expoſition, as I conceive, of the *Levitical* prohibitions, the huſband is forbidden, as near of kin to his wife, her mother, her daughter, her ſiſter.

And as the mother and daughter of his wife are expreſsly forbidden him in that ſeventeenth verſe, ſo is his wife's ſiſter in the next following verſe, "Neither ſhalt thou take a wife to her ſiſter to vex her, during her life." They add alſo, as prohibited the huſband by this rule, his wife's father's wife, her brother's wife, her ſon's wife.

From the ſame verſe they deduce a fourth rule [a], that the huſband is prohibited the near of kin to his wife's near of kin, as before in the prohibitions of conſanguinity; for he is literally prohibited the daughter of his wife's ſon, and her daughter's daughter, and by neceſſary inference alſo his wife's grandmother by father and mother, who are the near of kin to his wife's daughter and her mother, who are his wife's near of kin, which they thus ſtrongly prove.

A man is forbidden to take a woman and her ſon's daughter, or her daughter's daughter.

Therefore if a man marry his wife's grandmother, he hath taken a woman and her ſon's daughter, or her daughter's daughter, which is expreſsly forbid.

And in theſe are expreſs inſtances given of prohibiting the near of kin to his wife's near of kin, and are alſo termed his wife's near kinſwomen, as well as thoſe which ſtrictly are ſo.

By the ſame reaſon all others near of kin to his wife's father, brother, or ſiſter, are prohibited the huſband, as well as thoſe near of kin to her mother, her daughter, or ſon, and are equally *in terminis* within the words, his wife's near kinſwomen,

[a] For theſe rules ſee Seld. Ux. Ebraica, c. 4, 5.

kinſwomen, of which ſort they number ſixteen, the ſame with thoſe prohibited in the ſecond rule for conſanguinity.

And it is obſervable, that the parochial matrimonial table in uſe in *England* agrees in its prohibitions of marriages, which are thirty in number, for conſanguinity and affinity, with the *Levitical* prohibitions, according to the doctrine of the *Karait* rabbins in the four former rules.

But the *Karaits* prohibit eleven degrees of affinity (much of the ſame nature) more than the table doth in their two laſt rules; that is, The wife's father's wife, her brother's wife, her ſon's wife, her grandfather's wife by the father, her grandfather's wife by the mother, her father's brother's wife, her mother's brother's wife, her brother's ſon's wife, her ſiſter's ſon's wife, her ſon's ſon's wife, her daughter's ſon's wife.

And they have ſeven other prohibitions by a fifth rule, whereof our table receives none.

And this harmony between our matrimonial table and the *Karaits* expoſition of the *Levitical* degrees is more perhaps than hath been obſerved, to juſtify the perſons prohibited by the table, for as many as they are, to be the ſame levitically prohibited.

To this may be added, that by our vulgar tranſlation, and alſo by the Septuagint, (as I conceive,) the words, "Neither ſhalt thou take a wife to her ſiſter to vex her, to uncover her nakedneſs, beſides the other, during her life," *(Lev.* xviii. 18.) may be underſtood to prohibit the huſband his wife's ſiſter abſolutely, as well as to prohibit her during his wife's life; for the words (during her life) may relate either to the words, Thou ſhalt not take a wife to her ſiſter, viz. during her life; and in that ſenſe the meaning will be, that a man is not prohibited to marry his wife's ſiſter abſolutely, but only until his wife's death, and is conſonant to the expoſition of that place in *Leviticus* by the Scribes and Talmudical rabbies [a].

Or the words may be read thus, Thou ſhalt not take a wife to her ſiſter to vex her, during her life, or as long as ſhe lives; that is, to cauſe jealouſy and vexation to thy wife, during the whole time of her life; which ſenſe and reading ſquares with the doctrine of the *Karaits* upon *Leviticus*, and I think may well be defended by the Septuagint tranſlation.

The next thing I ſhall inſiſt on is, the authority of the Canons of the Apoſtles ſo ſtyled; whether they were *re vera* the Apoſtles or not, doubtleſs they are of both great antiquity and authority.

Of

[a] Seld. de Jure Naturali & Gentium, l. 5. c. 10. f. 591.

Of thoſe Canons the eighteenth hath theſe words, as they are publiſhed in the Canon Law.

Qui duas ſorores duxit aut conſobrinam clericus eſſe non poteſt. Can. Apoſt. 18.

1. This Canon cannot be underſtood of having two ſiſters for wives at the ſame time, for the *Chriſtians* never admitted two wives, or more, at a time; and therefore interdicting two ſiſters, qua ſiſters, at one time, was to no purpoſe.

2. The other part of the Canon, which is *aut conſobrinam*, that is, his brother or ſiſter's daughter taken to wife, ſhews the Canon reſpected only the nearneſs of relation.

That cleared, I reaſon thus, either marrying the wife's ſiſter, after the wife's death, was lawful when the Canon was made, or unlawful: for it relates to an offence done, *qui duxit*, not to a new-made offence. If lawful, why then was any puniſhment (namely excluſion from the clergy) inflicted for a lawful act? If it were unlawful in the Apoſtles time, how is it become now lawful?

It is true, as the learned *Grotius* [a] obſerves on this ſubject, a marriage may be unlawful in many reſpects, and yet the marriage ſtand good, and the *vinculum matrimonii* not diſſolved, but puniſhable ſome other ways, if made unlawful by human authority.

But this precept of the Apoſtles cannot be ſaid of human authority only, nor a new inſtitution, as is already noted; nor was there any divorce for inceſt among the *Jews*, as is noted after, but was always among the *Chriſtians* in *Chriſtian* ſtates.

2. In that time the Apoſtles and primitive *Chriſtian* church had no juriſdiction or power of legal divorce, ſeparation, and baſtarding the iſſue, how inceſtuous ſoever the marriage were; for thoſe were acts of juriſdiction and coercion, and could not be done but by the power of laws, to which the parties were locally ſubject. But the Apoſtles and church power was only to forbid them communion with the reſt of their brethren *Chriſtians*, and to deny the offenders ſuch things as were in their power, namely, to be of the clergy, as was done by this canon.

This appears by St. *Paul*, 1 *Cor.* v. It is reported there is fornication among you, and ſuch fornication as is not ſo much as named among the *Gentiles*, that one ſhould have his father's wife, which was an inceſt of the higheſt degree, although denoted by the word πορνεια.

Yet

[a] Grot. de Jure Belli, l. 2. c. 5. ſ. 14.

Yet St. *Paul* could do no more but direct the *Corinthians* from communion with that man, and to put away from among them that wicked perſon: he could neither null his marriage, nor illegitimate his iſſue, if he had any, nor put the offender to death, according to the *Moſaical* law, for theſe are effects of the civil power; and among the *Hebrews* no divorce was for inceſt, but the marriage was void, and the inceſt puniſhed, as in perſons unmarried. *Seld. Ux. Ebraica*, l. 1. c. 12. f. 87, 89.

The next thing obſervable from this Canon, is, that the makers were of opinion that the marriage with the *Conſobrina*, or brother or ſiſter's daughter, was equally unlawful as marriage with two ſiſters, and the puniſhment by the canon is equal.

Whence it follows, that the makers of the canon, apoſtles or others, did in thoſe two caſes follow the expoſition of the *Karaits*, and not of the *Talmudiſts*: the *Karaits* holding both marriages unlawful, but the *Talmudiſts* holding neither unlawful by *Moſes's* law.

But by what law divine the primitive and ſucceeding chriſtian churches conceived themſelves obliged (as generally they did, and do) in the matter of marriage, to obſerve the *levitical prohibitions* ſtrictly and indiſpenſably, is a queſtion of great difficulty: but ſurely they took their meaſures of thoſe prohibitions from the doctrine of the *Karaits*, more than from the *Scribes* and *Phariſees*, though the laſt were of more authority in the *Hebrew* commonwealth, as appears by that of *Matthew*, xxiii. 2, 3. The *Scribes* and *Phariſees* ſit in *Moſes* his ſeat, all therefore they bid you obſerve, that obſerve and do. Nor was it without reaſon done, for ſuch of thoſe degrees which are not particularly ſpecified in *Lev.* xviii. (for in thoſe the ſcribes and karaits agree) but are deduced by argument to be prohibited. The *Karaits* conclude in their prohibitions of marriage from the ſcripture itſelf, but the *Scribes* in theirs from the tradition and ſanctions of the elders, which traditions the *Chriſtians* often heeded not, as introduced frequently againſt God's law, as appears in the tradition of *Corban* againſt God's precept of honouring the father and mother, moſt ſignally.

Nor is it ſtrange that the opinions of private men prevail above the public in proceſs of time. So happened it in *Luther*, *Calvin*, and others, in the beginning of the reformation, whoſe opinions in time grew more authentic, both in doctrine and diſcipline here, and in many other ſtates, than the doctrine of the church of *Rome*, which was the pub-

lic before in both kinds: many like examples might be given, ancient and modern, which I purpoſely omit.

By a canon of another very ancient Provincial Council, called *concilium eliberinum*, under pope *Silveſter*, three hundred and fourteen years after Chriſt, and before the council of *Nice*, by the ſixteenth canon of that council; "*Si quis poſt obitum uxoris ſuæ ſororem ejus duxerit per quinquennium à communione abſtineat.* Grot. l. 2. c. 5. p. 256. Sect. 14.

By this ſo ancient council, marrying the wife's ſiſter was accounted unlawful but for the ſame reaſons as before; they could puniſh it no otherwiſe than by ways in the power of the church, which was to hinder the offender from communion for five years.

And in this council they followed the expoſition of the *Karaits* alſo concerning marriages, and not of the *Talmudiſts;* nor is it rational to conceive, that canons then forbidding any ſort of marriage, proceeded from an arbitrary power, aſſumed by thoſe who made them, as law makers, to which they could no way pretend, but becauſe it was unlawful by the principles and perſuaſion of all *Chriſtian believers.*

Vide for theſe Rules *Selden*'s *Uxor Ebraica*, l. 1. cap. 4, 5.

By the firſt rule is interdicted to a man his near of kin.	By the matrimonial table of *England* interdicted.
	page
The father's wife	The father's wife or ſtep-mother 11
The mother	The mother 10
The brother's wife	The brother's wife 18
The ſiſter	The ſiſter 16
The ſon's wife	The ſon's wife 15
The daughter	The daughter 13

By the ſecond rule is interdicted to a man the near of kin to his near of kin.

	page
The grand-father's wife by the father	The grand-father's wife by the father 2
The grand-father's wife by the mother	The grand-father's wife by the mother 2
The grand-mother by the father	The grand-mother by the father 1

The

	page
The grand-mother by the mother	The grandmother by the mother 1
The father's brother's wife	The father's brother's wife 6
The father's ſiſter	The father's ſiſter 4
The mother's brother's wife	The mother's brother's wife 7
The mother's ſiſter	The mother's ſiſter 5
The brother's ſon's wife	The brother's ſon's wife 27
The brother's daughter	The brother's daughter 25
The ſiſter's ſon's wife	The ſiſter's ſon's wife 28
The ſiſter's daughter	The ſiſter's daughter 26
The ſon's ſon's wife	The ſon's ſon's wife 21
The ſon's daughter	The ſon's daughter 19
The daughter's ſon's wife	The daughter's ſon's wife 22
The daughter's daughter	The daughter's daughter 20

By the third rule is interdicted to the huſband his wife's near of kin.

	page
From a woman and her father's wife	Omitted.
From a woman and her mother	From a woman and her mother 12
From a woman and her brother's wife	Omitted.
From a woman and her ſiſter	A woman and her ſiſter 17
From a woman and her ſon's wife	Omitted.
From a woman and her daughter	A woman and her daughter 14

By the fourth rule is interdicted to a man the near of kin to his wife's near of kin.

	page
A woman and her grand-mother by the mother	A woman and her grandmother by the mother 3
A woman and her grand-mother by the father	A woman and her grandmother by the father 3

		page
A woman and her father's brother's wife	O. A woman and her father's brother's wife	6
A woman and her mother's brother's wife	O. A woman and her mother's brother's wife	
A woman and her brother's ſon's wife	Omitted.	
A woman and her brother's daughter	A woman and her brother's daughter	29
A woman and her ſiſter's daughter	A woman and her ſiſter's daughter	3
A woman and her ſiſter's ſon's wife	Omitted.	
A woman and her ſon's ſon's wife	Omitted.	
A woman and her ſon's daughter	A woman and her ſon's daughter	23
A woman and her daughter's ſon's wife	Omitted.	
A woman and her daughter's daughter	A woman and her daughter's daughter	24
A woman and her father's ſiſter	A woman and her father's ſiſter	
A woman and her mother's ſiſter	A woman and her mother's ſiſter	
A woman and her grand-father's wife by the father	Omitted.	
A woman and her grand-father's wife by the mother	Omitted.	

Theſe laſt four degrees are not mentioned under the fourth rule by Mr. *Selden*, but referred to by the words, *& reliquis quæ ſuperſunt ex iis quæ in regula ſecunda propinquorum ſunt propinquæ;* but the two firſt of theſe laſt four are forbid in our matrimonial table, not the two laſt, as ſeveral others of the ſame kind; for the huſband is not forbid by the table the wives of his wives grand-fathers, nor her father's, nor brother's wife, nor ſon's wife, nor her father's brother's, nor mother's brother's wife, nor her brother's ſon's wife, nor ſiſter's ſon's wife, nor her ſon's ſon's wife, nor her daughter's ſon's wife.

By the fifth rule is interdicted that two near of kin may marry two other near of kin.

A man and his father from a woman and her daughter	O.
A man and his father from a woman and her ſon's wife	O.
A man and his father from a woman and her brother's wife	O.
A man and his father from a woman and her ſiſter	O.
A man and his brother from a woman and her brother's wife	O.
A man and his brother from a woman and her daughter	O.
A man and his brother from a woman and her ſon's wife	O.

None of thoſe compriſed in this fifth rule are prohibited by the matrimonial table, but all the perſons interdicted by the doctrine of the *Karaits* or ſcripture rabbies are alſo interdicted by the matrimonial table of *England*, excepting eleven perſons before mentioned, not interdicted to the wife's huſband by the table, who are interdicted by the *Karaits* enumeration, but in this paper are marked with cyphers, as to the matrimonial table in the firſt four rules of the *Karaits* doctrine. So as all the perſons prohibited by thoſe firſt four rules of the *Karaits*, being in number four and forty, are alſo prohibited by the matrimonial table, which, together with eleven perſons cyphered in the table, as excepted, make up the like number of four and forty, from which if you deduct eleven, as excepted, there will remain three and thirty, wherein the table and the *Karaits* agree.

And whereas the enumeration of the prohibited marriages to a man are in the table but thirty, and by conſequence ſo many to the woman; for where the man is prohibited to marry the woman, the woman muſt reciprocally be prohibited to marry the man; the reaſon is, becauſe in the number of degrees in the table the grandfather's wife, the grandmother, and the wife's grandmother, make but three degrees: but in the enumeration of the *Karaits* the grandfather's wife by the father, the grandfather's wife by the mother, the grandmother by the father, and the grandmother by

by the mother, the wife's grandmother by the father, and the wife's grandmother by the mother, are ſeverally enumerated, and ſo make ſix perſons, three more than are enumerated in the table, and the numbers agree.

The ſecond aſſertion. And as to the ſecond aſſertion, that admitting this marriage is not within the *Levitical* prohibitions, yet the temporal courts cannot prohibit the impeaching or drawing it into queſtion by the ſpiritual court.

There is a great difference between marriage within the *Levitical* prohibitions, and marriage within the *Levitical* degrees, which commonly are taken to be the ſame. For marriage within the *Levitical* prohibitions was always unlawful to the *Hebrews* by God's law, that is, the *Moſaic* law: but marriage within the *Levitical* degrees was not always unlawful; for marriage between perſons of the ſame nearneſs in affinity or conſanguinity, which only makes the degree, was in ſome caſe and circumſtance unlawful, in others lawful; ſo a marriage unlawful, and a marriage lawful, as the circumſtance varied in the ſame degree, that is, the ſame nearneſs of relation.

The *Levitical* degrees, qua ſuch, are ſet forth by no act of parliament; but marriages which fall within ſome of thoſe degrees are ſaid to be marriages within the degrees prohibited by God's law, by 28 *Hen.* VIII. c. 7. and 28 *Hen.* VIII. c. 16.

Nor is it ſaid in any act of parliament, that all marriages within the *Levitical* degrees are prohibited by God's law.

Sir *Edward Coke*, in the firſt edition, 235, but not in the reſt, of his *Littleton*, hath, I confeſs, theſe words: "By the ſtatute of 32 *Hen.* VIII. it is declared, That all perſons be lawful, that is, may lawfully marry, that are not prohibited by God's law to marry, that is to ſay, that be not prohibited by the *Levitical* degrees."

By which he makes all God's law, by which any marriage is prohibited, to be the *Levitical* degrees, which is not ſo; nor doth he *conſtare ſibi*, for in his Comment upon the Statute of 32 *Hen.* VIII. he ſaith expreſsly,

That marriage made with a perſon pre-contracted, or with a perſon naturally impotent, could not have been impeached in order to a divorce by reaſon of the ſtatute of 32 *Hen.* VIII. but becauſe ſuch marriages are againſt God's law. Yet they are not marriages within the *Levitical* degrees.

This marriage in queſtion therefore, though by way of admiſſion not within the *Levitical* prohibitions, if it be within the

the *Levitical* degrees at all, and whether unlawful or lawful within them, and by what law ſoever ſo unlawful or lawful, cannot be prohibited to be impeached by the Spiritual Courts, by the ſtatute of 32 *Hen.* VIII.

For that act prohibits the impeaching of marriages only which are abſolutely without the *levitical degrees*, leading all other to the Spiritual Juriſdiction as before the act of 32.

Now the *levitical degrees* are to be reckoned by the perſons whoſe carnal knowledge is forbidden a man in reſpect of conſanguinity or affinity by the law of *Moſes*. As the carnal knowledge of the mother, the father's wife, the ſon's wife, &c. in reſpect of conſanguinity of the wife's daughter, her daughter's daughter, her mother, &c. in reſpect of affinity. And it is plain, the wife's ſiſter is prohibited in ſome reſpect of affinity, by the words, neither ſhalt thou take a wife to her ſiſter, to vex her: therefore her marriage with her ſiſter's huſband is a marriage within the *levitical degrees*.

And agreed on all ſides to be unlawful within the degrees, if during the wife's life; but doubted if unlawful after her death.

Next, it is certain the wife's huſband was reſtrained from taking his wife's ſiſter as he might take another woman, that is either during his wife's life, or after: therefore his marriage with her was within the *levitical degrees*.

But it muſt be clearly without thoſe degrees, if the impeachment of it may be prohibited by the act of 32 *Hen.* VIII.

If a man marry his brother's wife, none will deny that marriage to be within the *levitical degrees*; yet in ſome caſe that marriage was lawful by the *Moſaic law*, that is, if the deceaſed brother died iſſueleſs. But that will not hinder the impeachment of ſuch marriage by the ſtatute of 32 *Hen.* VIII.

So if a man marry his father's brother's wife, it is a marriage within the *levitical degrees*. Yet if the father's brother were by the half blood only of the mother's ſide, the *Rabbies* and *Scribes* held ſuch marriage not unlawful by the *levitical law*, but by the ſanctions of the elders[a]. Many ſuch caſes may be found to prove a marriage may be lawful, though it be a marriage within the *levitical degrees*: but none of thoſe can therefore be prohibited to be impeached, for they are not marriages without the *levitical degrees*, as the ſtatute requires.

Accordingly Sir *Edward Coke* commenting upon the ſtatute of 32 *Hen.* VIII. in his ſecond inſtitutes, 683, ſets forth a ſcheme

[a] Seld. Uxor Ebraica, l. 1. c. 2. p. 8.

ſcheme of the *levitical degrees*, as neceſſary to the expoſition of that ſtatute, and therein enumerates the marriage of the wife's huſband with her ſiſter to be both within the *levitical degrees*, and prohibited by *Lev.* xviii.

One *Man* was ſued before the High Commiſſioners, 33 *Eliz.* for marrying his wife's ſiſter's daughter, and a prohibition was granted, as *Moore*, 907, reports the caſe, becauſe the marriage was not prohibited by the *levitical law*, which was no reaſon.

Crook reports the ſame caſe, 228, and that a prohibition was granted, but a conſultation was after granted, and that a ſentence of divorce was given.

In reporting this caſe of *Man*'s, Juſtice *Crook*'s words are, "a conſultation was granted, becauſe the prohibition is not to be, if the marriage be not within the *levitical degrees*."

Which is a great miſtake; for if the marriage be within the *levitical degrees*, no prohibition ought to iſſue; for it ought not to be but when the marriage is without the *levitical degrees*.

Then he adds, "but here the prohibition was general, and therefore not good;" which is not intelligible, whatever be intended by it.

For it muſt neceſſarily appear to the Court, that the marriage in queſtion was either without the *levitical degrees*, or within them.

If it were without the degrees, the Court did moſt unjuſtly to grant the conſultation, for it ought not to have been granted.

If the marriage were within the *levitical degrees*, it had been unjuſt not to grant a conſultation.

But a conſultation was granted, therefore the Court conceived the marriage of the huſband with his wife's ſiſter's daughter to be a marriage within the *levitical degrees*, and not without them, though it be not ſpecified in *Lev.* xviii. to be prohibited.

Sir *Edward Coke*, in the firſt edition of his *Littleton*, p. 235, ſaith, that one *Pierſon* was ſued in the Eccleſiaſtical Court for marrying his firſt wife's ſiſter's daughter againſt the canons of the church; and that the Court of Common Pleas, upon conſideration taken of the ſtatute of 32 *Hen.* VIII. granted a prohibition, becauſe the marriage was not prohibited by the *levitical degrees*. And theſe two caſes have been principally inſiſted on to prove no marriage is within the *levitical degrees*, if the degree be not particularly mentioned in *Lev.* xviii. But upon occaſion of *Harriſon*'s caſe, lately adjudged in this Court, I made ſearch for the records of thoſe

two caſes, but no record could be found of *Man*'s caſe; but by *Crook* a conſultation was granted in it.

By the record of *Pierſon*'s caſe, which was in Trinity, 2 *Jac.* it appears that in Hilary Term following a conſultation was granted, which Sir *Edward Coke* mentions not in his *Littleton*. And in the ſecond edition of his *Littleton*, and all the ſubſequent editions, that caſe is omitted.

I find likewiſe in the lord *Hobart*'s Reports, that one *Rennington* was queſtioned by the High Commiſſioners for marrying his wife's niece, and was ſentenced to penance, and bound to abſtain from her company; but they were not divorced *à vinculo matrimonii*, though there was cauſe, ſaith the book, and therefore the wife had her dower, nor was there any prohibition in the caſe.

So as by all theſe caſes the marriage of the huſband with his wife's ſiſter's daughter is a marriage prohibited within the *Levitical* degrees, for nearneſs of kindred to the wife; then of neceſſity the wife's ſiſter's marriage (who is nearer to the wife) with the wife's huſband muſt be prohibited *à fortiori*; ſo I conceive theſe three caſes full againſt the plaintiff.

It is not ſtrange that at firſt prohibitions were granted upon the ſtatute of 32. in caſes which were not ſpecifically mentioned in *Leviticus* xviii. but after diſcuſſions of the *Levitical* degrees upon conſultations prayed, it was manifeſtly found that divers marriages muſt be prohibited within the *Levitical* degrees, not nominally expreſſed in *Leviticus* xviii. as the marriage of the father with his own daughter, of the grandſon with his grandmother or grandfather's wife, of the ſon with his mother's brother's wife, of the uncle with his brother's or ſiſter's daughter, which ſince appears by Sir *Edward Coke* to be a prohibited marriage, and others upon like reaſon. *Cok. Inſt.* 2. f. 683, 684.

And was reſolved in archbiſhop *Laud*'s time, in the caſe of Sir *Giles Alington*, who was deeply fined, and a ſentence of divorce given, for marrying his brother's or ſiſter's daughter, which I heard at *Lambeth Houſe*.

And no prohibition was granted, though moved for, as very probable, and commonly reported; but we find no record of prohibitions denied, for there was no entry made of motions granted, but of prohibitions granted there is, which makes the granting of a prohibition of no great authority, unleſs upon action brought a conſultation be denied upon demurrer.

So of the huſband with his wife's ſiſter's daughter.

The third aſſertion. As to the third aſſertion, that admitting this marriage be without the *Levitical degrees*, yet it is prohibited by God's law, and therefore to be impeached notwithſtanding the ſtatute of 32 *Hen.* VIII. whoſe words are, No marriage, God's law excepted, ſhall be impeached without the *Levitical degrees*.

When an act of parliament declares a marriage to be againſt God's law, it muſt be admitted in all Courts and Proceedings of this kingdom to be ſo.

By an act, 25 *Hen.* VIII. c. 22. intitled, An act declaring the eſtabliſhment of the ſucceſſion of the king's moſt royal majeſty in the imperial crown of this realm:

Among ſundry marriages declared by that act to be marriages within the degrees of marriage prohibited by God's law, the marriage of a man with his wife's ſiſter is expreſly declared to be prohibited by God's law, and that a divorce ſhould be of ſuch marriage, if any ſuch were.

But this act is expreſly repealed by an act in 28 *Hen.* VIII. c. 7. intituled, An act for the eſtabliſhment of the imperial crown of this realm.

By that act of 28 *Hen.* VIII. it is declared in theſe words, And furthermore, ſince many inconveniencies have fallen, as well in this realm as others, by reaſon of the marrying within the degrees of marriage prohibited by God's law, That is to ſay, The ſon to marry the mother or the ſtep-mother, carnally known by his father, the brother the ſiſter; the father his ſon's daughter, or his daughter's daughter; or the ſon to marry the daughter of his father, procreat and born by his ſtep-mother: or the ſon to marry his aunt, being his father's or mother's ſiſter; or to marry his uncle's wife, carnally known by his uncle; or the father to marry his ſon's wife, carnally known by his ſon; or the brother to marry his brother's wife, carnally known by his brother; or any man married, and carnally knowing his wife, to marry his wife's daughter, or his wife's ſon's daughter; or his wife's daughter's daughter, or his wife's ſiſter.

Then it declares, Thoſe marriages to be indiſpenſable, becauſe againſt God's law, and that there ſhould be a ſeparation of ſuch marriages, if any were, and the children procreat in them to be illegitimate.

But this clauſe alſo of this act of 28 *Hen* VIII. as ſome conceive, is repealed by 1 and 2 *Phil.* and *Mar.* c. 8. in theſe words, And alſo all that part of the act made in the ſaid 28 *Hen.* VIII. intituled, An act for the eſtabliſhment of the ſucceſſion of the imperial crown of the realm, that concern-

eth a prohibition to marry within the degrees expreſſed in the ſaid act, ſhall henceforth be repealed, made fruſtrate, void, and of none effect.

By the act of 1 and 2 *Phil.* and *Mar.* two other laws are likewiſe repealed, which concern the queſtion before us, viz. An act in 28 *Hen.* VIII. c. 16. intituled, An act for the releaſe of ſuch as have obtained pretended licences and diſpenſations from the ſee of *Rome:* and the act of 32 *Hen.* VIII. c. 38. which hath been often mentioned.

But theſe two laſt acts are revived by the act of 1 *Eliz.* c. 1. and in force; but neither the act of 25 *Hen.* VIII. nor 28 *Hen.* VIII. c. 7. are revived in expreſs terms: and not only ſo, but the act of 1 *Eliz.* c. 1. hath this negative clauſe, That all other laws and ſtatutes, and the branches and clauſes of any act or ſtatute repealed by the ſaid act of repeal made in the time of the ſaid late king *Philip* and queen *Mary*, and not in this preſent act ſpecially mentioned and revived, ſhall ſtand, remain, and be repealed and void in ſuch like manner and form as they were before the making of this act.

Whence it follows, that this marriage is not now proved to be againſt God's law, by either of theſe repealed ſtatutes of 25 *Hen.* VIII. or 28 *Hen.* VIII. c. 7. unleſs it be made out, that one of them at leaſt remains at this day in force. And as for that,

The act of 28 *Hen.* VIII. c. 16. which makes void all diſpenſations from the ſee of *Rome*, and expreſly revived by 1 *Eliz.* and all branches, words, and ſentences thereof, hath theſe words, As a grace of the king to divers of his ſubjects, who had married by diſpenſation, notwithſtanding that act made all diſpenſations from *Rome* void.

All marriages had from the third of *November*, 26 *Hen.* VIII. for which no divorce or ſeparation is had, and which marriages be not prohibited by God's laws limited and declared in the act made this preſent parliament for eſtabliſhing the king's ſucceſſion, or otherwiſe, by holy ſcriptures, ſhall be good. By which words I conceive the clauſe of 28 *Hen.* VIII. c. 7. repealed in queen *Mary*'s time, is again revived.

It may be objected, the clauſe of 28 *Hen.* VIII. c. 7. concerning marriages prohibited by God's law, continues ſtill repealed, becauſe it is not ſpecially mentioned to be revived by the act of 1 *Eliz.* And therefore no act is in force declaring the huſband's marriage with his wife's ſiſter to be prohibited by God's law.

An act repealed is of no effect more than if it had been never made.

By the act of 28 *Hen.* VIII. c. 7. All marriages prohibited by God's law, limited and declared by the clauſe of that act, were unlawful, notwithſtanding any diſpenſation had before the repeal of that clauſe.

By the reviver in 1 *Eliz.* of 28 *Hen.* VIII. c. 16. and of every clauſe in it, All marriages prohibited by God's law, limited and declared by 28 *Hen.* VIII. c. 7. were again unlawful, as before the repeal, notwithſtanding any diſpenſation.

Therefore the ſtatute of 28 *Hen.* VIII. c. 7. was revived by the reviver of the ſtatute of 28 *Hen.* VIII. c. 16. in 1 *Eliz.* and made as effectual as before it was repealed, and ſo it continues.

If it had been enacted by parliament after the repeal of the clauſe in 28 *Hen.* VIII. c. 7. That all marriages prohibited by God's law, limited and declared by 28 *Hen.* VIII. c. 7. ſhould be unlawful, notwithſtanding any diſpenſation, that enacting had revived the clauſe in 28 *Hen.* VIII. c. 7.

Therefore the ſame thing being enacted by revival of 28 *Hen.* VIII. c. 16. muſt have the ſame effect of reviving that clauſe in 28 *Hen.* VIII. c. 7.

I will put it, for more clearneſs, by way of a caſe; a man before the third of *November*, 26 *Hen.* VIII. by diſpenſation from *Rome*, had married his wife's ſiſter's daughter, which marriage was prohibited by the canons of the church, and no divorce had been attempted in the caſe until after 1 *Eliz.* and the reviver of the ſtatute of 28 *Hen.* VIII. c. 16. which made void all deſpenſations from *Rome*.

It is plain, that this marriage being not prohibited by God's law, limited and declared in the act of 28 *Hen.* VIII. c. 7. was by the expreſs words of the revived act of 28 *Hen.* VIII. c. 16. a marriage to continue good without ſeparation, notwithſtanding all diſpenſations from *Rome* were nulled; becauſe it was no marriage excepted out of the grace intended and given by that act to the king's ſubjects married by diſpenſation before *November* the third, 26 *Hen.* VIII. and not then ſeparated.

But if a marriage before the third of *November*, 26 *Hen.* VIII. had been by diſpenſation between the brother and ſiſter, or as this caſe is between the huſband and his wife's ſiſter, and no ſeparation attempted until after 1 *Eliz.* and the reviver of the act of 28 *Hen.* VIII. c. 16. Theſe marriages were not to continue good, and without ſeparation by 28 *Hen.* VIII. c. 16, becauſe they were marriages particularly excepted

excepted out of the grace granted by that act, as being prohibited by God's law, limited and declared in the act of 28 *Hen.* VIII. c. 7. which proves 28 *Hen.* VIII. c. 7. to be in force by the reviver of 28 *Hen.* VIII. c. 16. and conſequently the marriage in queſtion to be clearly againſt God's law, which is the thing to be proved.

In the ſtatute of 28 *Hen.* VIII. c. 7. there are two clauſes concerning marriages, The firſt declaring certain marriages there recited, to be within the degrees prohibited by God's law, which clauſe concerns the preſent queſtion, and is before cited.

The ſecond clauſe, in theſe words; Be it therefore enacted, that no perſon or perſons, ſubjects or reſiants of this realm, or in any your dominions, of what eſtate, degree, or degrees ſoever they be, ſhall from henceforth marry within the degrees afore rehearſed, what pretence ſoever ſhall be made to the contrary thereof. Then it proceeds,

That if there were any divorce or ſeparation made of any ſuch marriages by the arch-biſhops or miniſters of the church of *England*, ſuch ſeparation ſhould remain good, and not be revokable by any authority; and the children procreated under ſuch unlawful marriage, ſhould be illegitimate.

And if any ſuch marriages were in any the king's dominions without ſeparation, that there ſhould be a ſeparation from the bonds of ſuch unlawful marriage.

Now we muſt obſerve, the act of 1 and 2 *Phil.* and *Mar.* c. 8. doth not repeal this act entirely of 28 *Hen.* VIII. c. 7. but repeals only one clauſe of it; the words of which clauſe of repeal are before cited, and manifeſt this ſecond clauſe of the act of 28 *Hen.* VIII. and not the firſt to be the clauſe intended to be repealed.

For there was no reaſon to repeal the clauſe declaratory of marriages prohibited by God's law, which the church of *Rome* always acknowledged; nor do the words of repeal import any thing concerning marriages within degrees prohibited by God's law.

But (as the time then was) there was reaſon to repeal a clauſe enacting all ſeparations of ſuch marriages with which the *Pope* had diſpenſed, ſhould remain good againſt his authority; and that ſuch marriages with which he had diſpenſed, not yet ſeparated, ſhould be ſeparate.

And the words of the clauſe of repeal manifeſt the ſecond clauſe to be intended, viz. All that part of the act made in the ſaid eight and twentieth year of king *Henry* the eighth, which concerneth a prohibition to marry within the degrees expreſſed in the ſaid act, ſhall be repealed, &c.

As

As it is true, that if a marriage be declared by act of parliament to be againſt God's law, we muſt admit it to be ſo; for by a law (that is, by an act of parliament) it is ſo declared.

By the ſame reaſon, if by a lawful canon, a marriage be declared to be againſt God's law, we muſt admit it to be ſo; for a lawful canon is the law of the kingdom, as well as an act of parliament: and whatever is the law of the kingdom, is as much the law as any thing elſe that is ſo; for what is law doth not *ſuſcipere magis aut minus*.

But by a lawful canon of this kingdom, which is enough, and not only ſo, but by a canon warranted by act of parliament, the marriage in queſtion is declared to be prohibited by God's law, therefore we muſt admit it to be ſo.

In a ſynod of convocation holden at *London* in the year 1603, for the province of *Canterbury*, by the king's writ, and with the king's licence under the great ſeal of *England*, to treat, conſult, and agree of ſuch canons and conſtitutions eccleſiaſtic as ſhould be there thought fit. Several Canons were concluded and agreed.

To which king *James* gave his royal aſſent and approbation, and by his letters patent ratified and confirmed them, according to the form of the ſtatute made in 25 *Hen.* VIII. c. 19. and commanded the due obſervance of them. Among which the ninety-ninth canon is,

No perſon ſhall marry within the degrees prohibited by God's law, and expreſſed in a table ſet forth by authority in the year of our Lord 1563, and all marriages ſo made and contracted, ſhall be adjuded inceſtuous and unlawful; and the aforeſaid table ſhall be in every church publicly ſet up and fixed at the charge of the pariſh.

Which is the ſame as—No perſon ſhall marry within the degrees prohibited by God's law, and which degrees are expreſſed in the table, &c.

For to the queſtion, what is expreſſed in the table? there can be no anſwer, but the degrees prohibited by God's law.

But by this table, this marriage in queſtion is expreſſed to be in a degree prohibited by God's law, therefore it muſt be admitted to be ſo,

Another conſequent is this, that by this canon, and conſequently by the law of this kingdom, All marriages prohibited by that table, are declared to be within the degrees prohibited by God's law.

Note, That any marriage unlawful by holy ſcripture, is declared here to be againſt God's law judicially, no otherwiſe, than becauſe by the law of the land the ſcripture itſelf

ſelf is declared and approved to be the law of God; for the ſcripture cannot judge itſelf to be ſcripture without ſome judicature.—Therefore by the ſixth canon, *tempore Ed.* VI. at a convocation in *London*, *Anno* 1552, the authority of the Old Teſtament was declared. At a convocation of both provinces in *London*, *Anno* 1562, the canonical and apocryphal books of the Old Teſtament were particularly enumerated, and the books of the New declared canonical, as received. By the ſeventh canon the authority of the Old Teſtament is declared.

By the act it is ſaid, that the Clergy of this kingdom, nor any of them, ſhall henceforth enact, promulgate, or execute any canons, conſtitutions, or ordinances provincial, by whatſoever name or names they may be called, in their convocations, in time coming, which ſhall always be aſſembled by authority of the king's writ, unleſs the ſame Clergy may have the king's moſt royal aſſent and licence to make, promulge, and execute ſuch canons, conſtitutions, and ordinances provincial, &c. This marriage between a man and his wife's ſiſter being held inceſtuous; a writ of *Conſultation* was thereupon awarded. *Hill and his Wife againſt Thomas Good*, ſurrogate. *Vaughan's Reports* 302, A. D. 1672.

TRIAL of CHARLES I. KING of ENGLAND,

BEFORE THE

HIGH COURT of JUSTICE, A. D. 1648.

IN the beginning of the year 1648 the Commons framed an ordinance for the trial of King *Charles* I. which they ſent to the Houſe of Peers for their concurrence; but the Lords rejected it, and, that they might not be preſſed any more upon that head, adjourned for nine days. Whereupon ſome Members of the Commons moved, that the Lords might be impeached of high treaſon; however, they contented themſelves with making the following reſolutions: 1. That the people were, under God, the original of all juſt power. 2. That the Commons of *England*, being choſen by and repreſenting the people, were the ſupreme power of the nation. And, 3. That whatever was enacted or declared to be law by the Houſe of Commons aſſembled in Parliament, had the force of a law, though the conſent of the King and the Houſe of Peers was not had thereto. They then proceeded to finiſh their ordinance for the trial, in the preamble

preamble whereof they recite, "That the King, not being contented with the many encroachments made by his predeceſſors on the people's rights, but deſigning totally to ſubvert the conſtitution, and introduce an arbitrary government, had levied war againſt the Parliament, whereby infinite miſchiefs had enſued; for which high and treaſonable offences, and to the end no chief officer or magiſtrate might preſume for the future to attempt the enſlaving and deſtruction of the nation with impunity, they did ordain and enact, that *Thomas* Lord *Fairfax*, *Oliver Cromwell*, *Henry Ireton (and an hundred and thirty more)*, ſhould be Commiſſioners and Judges for the trial of the King."

John Bradſhaw, Serjeant at Law, was appointed their Preſident, Mr. *Steel* was made their Attorney General, and Mr, *Cook* their Solicitor, to manage the evidence. A Court was alſo erected at the upper end of *Weſtminſter-Hall*, and the King brought to *Cotton-Houſe*, that he might be near their tribunal.

Theſe Commiſſioners, ſitting in private in the Star-Chamber, the 20th of January, reſolved, that the method of proceeding, as to the reading the commiſſion, ſending for the royal priſoner, aſking him queſtions, &c. ſhould be left to their Preſident, on whom they conferred the title of Lord Preſident. And it was further reſolved, that if his Majeſty carried it inſolently or contemptuouſly to their Court, it ſhould be left to their Lord Preſident to reprehend him, and admoniſh him of his duty, or command him to be taken away; but as to the priſoner's taking off his hat, they determined not to inſiſt on it that day, and if he deſired time the Lord Preſident ſhould give him time.

Afterwards, on the ſame day, the Lord Preſident of the High Court of Juſtice, with near fourſcore of the Members of the ſaid Court, having 16 gentlemen with partizans, and a ſword and a mace, with their and other Officers of the ſaid Court, marching before them, came to the place ordered to be prepared for their ſitting at the weſt end of the great hall at *Weſtminſter*, where the Lord Preſident in a crimſon velvet chair, fixed in the midſt of the court, placed himſelf, having a deſk with a crimſon velvet cuſhion before him; the reſt of the members placing themſelves on each ſide of him upon ſeveral ſeats or benches prepared and hung with ſcarlet for that purpoſe; and the partizans dividing themſelves on each ſide of the court before them.

The Court being thus ſat, and ſilence made, the great gate of the ſaid hall was ſet open, to the end that all perſons, without

without exception, desirous to see or hear, might come into it. Upon which the hall was presently filled, and silence again ordered.

This done, Colonel *Thomlinson*, who had the charge of the prisoner, was commaded to bring him to the Court, who within a quarter of an hour's space brought him, attended with about twenty officers with partizans marching before him, there being other gentlemen, to whose care and custody he was likewise committed, marching in his rear.

Being thus brought up within the face of the Court, the Serjeant at Arms, with his mace, receives and conducts him strait to the bar, having a crimson velvet chair before him. After a stern looking upon the Court, and the people in the galleries on each side of him, he places himself, not at all moving his hat, or otherwise shewing the least respect to the Court; but presently rises up again, and turns about, looking downwards upon the guards placed on the left side, and on the multitude of spectators on the right side of the said great hall. After silence made among the people, the act of Parliament for the trying of *Charles Stuart*, King of *England*, was read over by the Clerk of the Court, who sat on one side of a table covered with a rich *Turkey* carpet, and placed at the feet of the said Lord President, upon which table were also laid the sword and mace.

After reading the said act, the several names of the Commissioners were called over, every one who was present, being only eighty, rising up, and answering to his call.

Having again placed himself in his chair, with his face towards the Court, silence being again ordered, the Lord President stood up and said:

Ld. President. Charles Stuart, King of *England*, the Commons of *England*, assembled in Parliament, being deeply sensible of the calamities that have been brought upon this nation, (which is fixed upon you as the principal author of it,) have resolved to make inquisition for blood; and according to that debt and duty they owe to justice, to God, the kingdom, and themselves, and according to the fundamental power that rests in themselves, they have resolved to bring you to trial and judgment, and for that purpose have constituted this High Court of Justice, before which you are brought.

This said, Mr. *Cook*, Solicitor for the Commonwealth, (standing within a bar on the right hand of the prisoner,) offered to speak; but the King having a staff in his hand, held it up, and laid it upon Mr. *Cook*'s shoulders two

or

or three times, bidding him hold. Nevertheleſs, the Lord Preſident ordering him to go on, he ſaid:

Mr. *Cook*. My Lord, I am commanded to charge *Charles Stuart*, King of *England*, in the name of the Commons of *England*, with treaſon and high miſdemeanors; I deſire the ſaid charge may be read.

The ſaid charge being delivered to the clerk of the Court, the Lord Preſident ordered it ſhould be read; but the king bid him hold. Nevertheleſs, being commanded by the Lord Preſident to read it, the clerk began, and the priſoner ſat down again in his chair.

A Charge of High Treaſon, and other High Crimes exhibited to the High Court of Juſtice by John Cook, *Eſq. Solicitor General, appointed by the ſaid Court, for and on behalf of the people of* England, *againſt* Charles Stuart *King of* England.

"THAT he the ſaid *Charles Stuart* being admitted king of *England*, and therein truſted with a limited power to govern by and according to the laws of the land, and not otherwiſe; and by his truſt, oath and office, being obliged to uſe the power committed to him, for the good and benefit of the people, and for the preſervation of their rights and liberties: yet nevertheleſs, out of wicked deſign to erect and uphold in himſelf an unlimited and tyrannical power to rule according to his will, and to overthrow the rights and liberties of the people; yea, to take away and make void the foundations thereof, and of all redreſs and remedy of miſgovernment, which by the fundamental conſtitutions of this kingdom were reſerved on the people's behalf, in the right and power of frequent and ſucceſſive parliaments or national meetings in council; he the ſaid *Charles Stuart*, for accompliſhment of ſuch his deſigns, and for the protecting of himſelf and his adherents in his and their wicked practices, to the ſame ends, hath traitorouſly and maliciouſly levied war againſt the preſent parliament, and the people therein repreſented. Particularly, upon or about the thirtieth day of *June*, in the year of our Lord 1642, at *Beverly* in the county of *York*; and upon or about the thirtieth day of *July* in the year aforeſaid, in the county of the city of *York*; and upon or about the four and twentieth day of *Auguſt* in the ſame year, at the county of the town of *Nottingham*, where, and when he ſet up his ſtandard of war; and alſo on or about the twenty-third day of *October*, in the ſame year at *Edge-hill* and *Keynton-field*, in the county of *Warwick*; and upon or about the thirtieth day of *November* in the ſame year, at

Brentford

Brentford in the county of *Middleſex*; and upon or about the thirtieth day of *Auguſt*, in the year of our Lord 1643, at *Caverſham Bridge* near *Reading* in the county of *Berks*; and upon or about the thirtieth day of *October* in the year laſt mentioned, at or near the city of *Glouceſter*; and upon or about the thirtieth day of *November* in the year laſt mentioned, at *Newbury* in the county of *Berks*; and upon or about the thirty-firſt day of *July* in the year of our Lord 1644, at *Cropredy Bridge* in the county of *Oxon*; and upon or about the thirtieth day of *September* in the laſt year mentioned, at *Bodmyn* and other places near adjacent in the county of *Cornwall*; and upon or about the thirtieth day of *November* in the year laſt mentioned, at *Newbury* aforeſaid; and upon or about the eighth day of *June*, in the year of our Lord 1645, at the town of *Leiceſter*; and alſo upon the fourteenth day of the ſame month in the ſame year, at *Naſeby-field* in the county of *Northampton*: at which ſeveral times and places, or moſt of them, and at many other places in this land, at ſeveral other times within the years afore-mentioned, and in the year 1646, he the ſaid *Charles Stuart* hath cauſed and procured many thouſands of the free people of this nation to be ſlain; and by diviſions, parties, and inſurrections within this land, by invaſions from foreign parts, endeavoured and procured by him, and many other evil ways and means, he the ſaid *Charles Stuart* hath not only maintained and carried on the ſaid war both by land and ſea, during the years before mentioned, but alſo hath renewed or cauſed to be renewed the ſaid war againſt the parliament and good people of this nation, in this preſent year 1648, in the counties of *Kent*, *Eſſex*, *Surry*, *Suſſex*, *Middleſex*, and many other places of *England* and *Wales*; and alſo by ſea. And particularly, he the ſaid *Charles Stuart* hath for that purpoſe given commiſſion to his ſon the prince, and others; whereby, beſides multitudes of other perſons, many ſuch as were by the parliament intruſted and employed for the ſafety of the nation, (being by him or his agents corrupted to the betraying of their truſt, and revolting from the parliament) have had entertainment and commiſſion for the continuing and renewing of war and hoſtility againſt the ſaid parliament, and people as aforeſaid. By which cruel and unnatural wars by him the ſaid *Charles Stuart* levied, continued and renewed as aforeſaid, much innocent blood of the free people of this nation hath been ſpilt, many families have been undone, the public treaſury waſted and exhauſted, trade obſtructed and miſerably decayed, vaſt expence and damage to the nation incurred, and many parts of this

this land ſpoiled, ſome of them even to deſolation. And for further proſecution of his ſaid evil deſigns, he the ſaid *Charles Stuart* doth ſtill continue his commiſſion to the ſaid prince, and other rebels and revolters both *Engliſh* and foreigners, and to the earl of *Ormond*, and to the *Iriſh* rebels and revolters aſſociated with him; from whom further invaſions upon this land are threatened, upon the procurement and on the behalf of the ſaid *Charles Stuart*.

"All which wicked deſigns, wars, and evil practices of him the ſaid *Charles Stuart*, have been and are carried on for the advancement and upholding of a perſonal intereſt of will and power, and pretended prerogative to himſelf and his family, againſt the public intereſt, common right, liberty, juſtice, and peace of the people of this nation, by and for whom he was intruſted as aforeſaid.

"By all which it appeareth, that he the ſaid *Charles Stuart* hath been, and is the occaſioner, author, and continuer of the ſaid unnatural, cruel and bloody wars, and therein guilty of all the treaſons, murders, rapines, burnings, ſpoils, deſolations, damages, and miſchiefs, to this nation acted and committed in the ſaid wars, or occaſioned thereby.

"And the ſaid *John Cook* by proteſtation ſaving, on the behalf of the ſaid people of *England*, the liberty of exhibiting at any time hereafter any other charge againſt the ſaid *Charles Stuart*, and alſo of replying to the anſwers which the ſaid *Charles Stuart* ſhall make to the premiſes, or any of them, or any other charge that ſhall be ſo exhibited; doth for the ſaid treaſons and crimes, on the behalf of the ſaid people of *England*, impeach the ſaid *Charles Stuart*, as a tyrant, traitor, murderer, and a public and implacable enemy to the commonwealth of *England;* and pray that the ſaid *Charles Stuart*, king of *England*, may be put to anſwer all and every the premiſes; and that ſuch proceedings, examinations, trials, ſentences and judgments may be thereupon had, as ſhall be agreeable to Juſtice.

Subſcribed, *John Cook*."

The king, while the charge was reading, ſat down in his chair, looking ſometimes on the High-court, and ſometimes on the galleries; and roſe again, and turned about to behold the guard and ſpectators, and after ſat down, looking very ſternly, and with a countenance not at all moved, till theſe words, *viz.* Charles Stuart *to be a tyrant, traitor*, &c. were read;

read; at which he laughed, as he ſat, in the face of the Court.

The charge being read

Ld. Preſident. Sir, you have now heard your charge, containing ſuch matter as appears in it: you find that in the cloſe of it, it is prayed to the Court, in behalf of the Commons of *England*, that you anſwer to your charge. The Court expects your anſwer.

King. I would know by what power I am called hither; I was not long ago in the *Iſle of Wight;* how I came there, is a longer ſtory than I think it fit at this time for me to ſpeak of; but there I entered into a treaty with both houſes of parliament, with as much public faith as it's poſſible to be had of any people in the world. I treated there with a number of honourable lords and gentlemen, and treated honeſtly and uprightly; I cannot ſay but they did very nobly with me, we were upon the concluſion of the treaty. Now I would know by what authority, I mean lawful; there are many unlawful authorities in the world, thieves and robbers by the highways; but I would know by what authority I was brought from thence, and carried from place to place, and I know not what: and when I know what lawful authority, I ſhall anſwer. Remember, I am your king, your lawful king, and what ſins you bring upon your heads, and the judgment of God upon this land; think well upon it, I ſay, think well upon it, before you go further from one ſin to a greater: therefore let me know by what lawful authority I am ſeated here, and I ſhall not be unwilling to anſwer. In the mean time, I ſhall not betray my truſt; I have a truſt committed to me by God, by old and lawful deſcent, I will not betray it, to anſwer to a new unlawful authority: therefore reſolve me that, and you ſhall hear more of me.

Ld. Preſident. If you had been pleaſed to have obſerved what was hinted to you by the Court, at your firſt coming hither, you would have known by what authority; which authority requires you, in the name of the people of *England*, of which you are elected king, to anſwer them.

King. No, Sir, I deny that.

Ld. Preſident. If you acknowledge not the authority of the Court, they muſt proceed.

King. I do tell them ſo, *England* was never an elective kingdom, but an hereditary kingdom for near theſe thouſand years; therefore let me know by what authority I am called hither: I do ſtand more for the liberty of my people, than any here that come to be my pretended judges; and therefore

fore let me know by what lawful authority I am ſeated here, and I will anſwer it; otherwiſe I will not anſwer it.

Ld. Preſident. Sir, how really you have managed your truſt, is known: your way of anſwer is to interrogate the Court, which beſeems not you in this condition. You have been told of it twice or thrice.

King. Here is a gentleman, Lieutenant-colonel *Cobbet*; aſk him, if he did not bring me from the *Iſle of Wight* by force. I do not come here as ſubmitting to the Court: I will ſtand as much for the privileges of the Houſe of Commons, rightly underſtood, as any man here whatſoever. I ſee no Houſe of Lords here, that may conſtitute a parliament; and the king too ſhould have been. Is this the bringing of the king to his parliament? Is this the bringing an end to the treaty in the public faith of the world? Let me ſee a legal authority warranted by the word of God, the ſcriptures, or warranted br the conſtitutions of the kingdom, and I will anſwer.

Ld. Preſident. Sir, you have propounded a queſtion, and have been anſwered. Seeing you will not anſwer, the Court will conſider how to proceed: in the mean time, thoſe that brought you hither, are to take charge of you back again. The Court deſires to know, whether this be all the anſwer you will give, or no.

King. Sir, I deſire that you would give me, and all the world, ſatisfaction in this: let me tell you, it is not a ſlight thing you are about. I am ſworn to keep the peace, by that duty I owe to God and my country, and I will do it to the laſt breath of my body; and therefore ye ſhall do well to ſatisfy firſt God, and then the country, by what authority you do it: if you do it by an uſurped authority, you cannot anſwer. There is a God in heaven, that will call you, and all that give you power to account. Satisfy me in that, and I will anſwer: otherwiſe I betray my truſt, and the liberties of the people: and therefore think of that, and then I ſhall be willing. For I do avow, that it is as great a ſin to withſtand lawful authority, as it is to ſubmit to a tyrannical, or any other ways unlawful authority; and therefore ſatisfy me in that, and you ſhall receive my anſwer.

Ld. Preſident. The Court expects you ſhould give them a final anſwer; their purpoſe is to adjourn to *Monday* next, if you do not ſatisfy yourſelf, though we do tell you our authority; we are ſatisfied with our authority, and it is upon God's authority and the kingdom's, and that peace you ſpeak of will be kept in the doing of juſtice, and that's our preſent work.

King.

King. For anſwer, let me tell you, you have ſhewn no lawful authority to ſatisfy any reaſonable man.

Ld. Preſident. That is, in your apprehenſion; we are ſatisfied that are your judges.

King. It is not my apprehenſion, nor yours neither, that ought to decide it.

Ld. Preſident. The Court hath heard you, and you are to be diſpoſed of as they have commanded.

The Court adjourns to the painted-chamber, on *Monday* at ten of the clock in the forenoon, and thence hither.

It is to be obſerved, that as the charge was reading againſt the king, the head of his ſtaff fell off, which he wondered at; and ſeeing none to take it up, he ſtoops for it himſelf.

As the king went away, facing the Court, he ſaid, I do not fear that, (meaning the ſword.) The people in the hall, as he went down the ſtairs, cry'd out, ſome, *God ſave the king*, and moſt for *Juſtice*.

ON *Monday* the 22d of *January*, upon the king's coming in, a ſhout was made.

Command given by the Court to the captain of the guard, to fetch and take into his cuſtody, thoſe who make any diſturbance.

Mr. Solicitor. May it pleaſe your lordſhip, my Lord Preſident; I did at the laſt Court, in the behalf of the Commons of *England*, exhibit and give into this Court a charge of high-treaſon, and other high crimes againſt the priſoner at the bar; whereof I do accuſe him in the name of the people of *England:* and the charge was read unto him, and his anſwer required. My lord, he was not then pleaſed to give an anſwer, but inſtead of anſwering, did there diſpute the authority of this high Court. My humble motion to this high Court in behalf of the kingdom of *England*, is, That the priſoner may be directed to make a poſitive anſwer, either by way of confeſſion, or negation; which if he ſhall refuſe to do, that the matter of the charge may be taken *pro confeſſo*, and the court may proceed according to juſtice.

Ld. Preſident. Sir, you may remember at the laſt Court you were told the occaſion of your being brought hither, and you heard a charge of high-treaſon and other high crimes againſt this realm of *England;* you heard likewiſe, that it was prayed in the behalf of the people, that you ſhould give an anſwer to that charge, that thereupon ſuch proceedings might be had, as ſhould be agreeable to juſtice. You were

then

then pleaſed to make ſome ſcruples concerning the authority of this Court, and knew not by what authority you were brought hither; you did divers times propound your queſtions, and were as often anſwered, that it was by authority of the commons of *England* aſſembled in parliament, that did think fit to call you to an account for thoſe high and capital miſdemeanors, wherewith you were then charged. Since that the Court hath taken into conſideration what you then ſaid, they are fully ſatisfied with their own authority, and they hold it fit you ſhould ſtand ſatisfied with it too; and they do require it, that you do give a poſitive and particular anſwer to this charge that is exhibited againſt you: they do expect you ſhould either confeſs or deny it; if you deny, it is offered in the behalf of the kingdom to be made good againſt you: their authority they do avow to the whole world, that the whole kingdom are to reſt ſatisfied in, and you are to reſt ſatisfied with it. And therefore you are to loſe no more time, but to give a poſitive anſwer thereunto.

King. When I was here laſt, it is very true, I made that queſtion; and truly if it were only my own particular caſe, I would have ſatisfied myſelf with the proteſtation I made the laſt time I was here againſt the legality of this Court, and that a king cannot be tried by any ſuperior juriſdiction on earth: but it is not my caſe alone, it is the freedom and the liberty of the people of *England;* and do you pretend what you will, I ſtand more for their liberties. For if power without law may make laws, may alter the fundamental laws of the kingdom, I do not know what ſubject he is in *England*, that can be ſure of his life, or any thing that he calls his own: therefore, when that I came here, I did expect particular reaſons to know by what law, what authority you did proceed againſt me here. And therefore I am a little to ſeek what to ſay to you in this particular, becauſe the affirmative is to be proved, the negative often is very hard to do; but ſince I cannot perſuade you to do it, I ſhall tell you my reaſons as ſhort as I can.

My reaſons why in conſcience and the duty I owe to God firſt, and my people next, for the preſervation of their lives, liberties, and eſtates, I conceive I cannot anſwer this, till I be ſatisfied of the legality of it.

All proceedings againſt any man whatſoever—

Ld. Preſident. Sir, I muſt interrupt you, which I would not do, but that what you do is not agreeable to the proceedings of any Court of juſtice: you are about to enter into argument, and diſpute concerning the authority of this Court,

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Court, before whom you appear as a priſoner, and are charged as an high delinquent; if you take upon you to diſpute the authority of the Court, we may not do it, nor will any Court give way unto it: you are to ſubmit unto it, you are to give a punctual and direct anſwer, whether you will anſwer your charge or no, and what your anſwer is.

King. Sir, by your favour, I do not know the forms of law; I do know law and reaſon, though I am no lawyer profeſſed, but I know as much law as any gentleman in *England*; and therefore (under favour) I do plead for the liberties of the people of *England* more than you do: and, therefore, if I ſhould impoſe a belief upon any man, without reaſons given for it, it were unreaſonable; but I muſt tell you, that that reaſon that I have, as thus informed, I cannot yield unto it.

Ld. Preſident. Sir, I muſt interrupt you, you may not be permitted: you ſpeak of law and reaſon; it is fit there ſhould be law and reaſon, and there is both againſt you. Sir, the vote of the Commons of *England* aſſembled in parliament, it is the reaſon of the kingdom, and they are theſe that have given to that law, according to which you ſhould have ruled and reigned. Sir, you are not to diſpute our authority, you are told it again by the Court. Sir, it will be taken notice of, that you ſtand in contempt of the Court, and your contempt will be recorded accordingly.

King. I do not know how a king can be a delinquent; but by any law that ever I heard of, all men (delinquents or what you will) let me tell you, they may put in demurrers againſt any proceeding as legal: and I do demand that, and demand to be heard with my reaſons; if you deny that, you deny reaſon.

Ld. Preſident. Sir, you have offered ſomething to the Court; I ſhall ſpeak ſomething unto you, the ſenſe of the Court. Sir, neither you, nor any man, are permitted to diſpute that point; you are concluded; you may not demur to the juriſdiction of the Court: if you do, I muſt let you know, that they over-rule your demurrer; they ſit here by the authority of the Commons of *England*, and all your predeceſſors and you are reſponſible to them.

King. I deny that; ſhew me one precedent.

Ld. Preſident. Sir, you ought not to interrupt while the Court is ſpeaking to you. This point is not to be debated by you, neither will the Court permit you to do it; if you offer it by way of demurrer to the juriſdiction of the

Court, they have conſidered of their juriſdiction, they do affirm their own juriſdiction.

King. I ſay, Sir, by your favour, that the Commons of *England* was never a court of judicature; I would know how they came to be ſo.

Ld. Preſident. Sir, you are not to be permitted to go on in that ſpeech and theſe diſcourſes.

Then the Clerk of the Court read as followeth:

"*Charles Stuart*, King of *England*, you have been accuſed, on the behalf of the people of *England*, of high treaſon, and other high crimes; the Court have determined that you ought to anſwer the ſame."

King. I will anſwer the ſame, ſo ſoon as I know by what authority you do this.

Ld. Preſident. If this be all that you will ſay, then, gentlemen, you that brought the priſoner hither, take charge of him back again.

King. I do require that I may give in my reaſons why I do not anſwer, and give me time for that.

Ld. Preſident. Sir, 'tis not for priſoners to require.

King. Priſoners! Sir, I am not an ordinary priſoner.

Ld. Preſident. The Court hath conſidered of their juriſdiction, and they have already affirmed their juriſdiction; if you will not anſwer, we ſhall give order to record your default.

King. You never heard my reaſons yet.

Ld. Preſident. Sir, your reaſons are not to be heard againſt the higheſt juriſdiction.

King. Shew me that juriſdiction where reaſon is not to be heard.

Ld. Preſident. Sir, we ſhew it you here, the Commons of *England*; and the next time you are brought, you will know more of the pleaſure of the Court; and, it may be, their final determination.

King. Shew me where ever the Houſe of Commons was a Court of judicature of that kind.

Ld. Preſident. Serjeant, take away the priſoner.

King. Well, Sir, remember that the king is not ſuffered to give in his reaſons for the liberty and freedom of all his ſubjects.

Ld. Preſident. Sir, you are not to have liberty to uſe this language: how great a friend you have been to the laws and liberties of the people, let all *England* and the world judge.

King. Sir, under favour, it was the liberty, freedom, and laws of the ſubject, that ever I took——defended myſelf with

with arms; I never took up arms againſt the people, but for the laws.

Ld. Preſident. The command of the Court muſt be obeyed; no anſwer will be given to the charge.

King. Well, Sir!

And ſo he was guarded forth to Sir *Robert Cotton*'s houſe.

His majeſty not being ſuffered to deliver his reaſons againſt the juriſdiction by word of mouth, thought fit to leave them in writing, to the more impartial judgment of poſterity, as followeth:

" HAVING already made my proteſtations, not only againſt the illegality of this pretended court, but alſo, *that no earthly power can juſtly call me* (who am your king) *in queſtion as a delinquent*; I would not any more open my mouth upon this occaſion, more than to refer myſelf to what I have ſpoken, were I in this caſe alone concerned: but the duty I owe to God in the preſervation of the true liberty of my people, will not ſuffer me at this time to be ſilent. For how can any free-born ſubject of *England* call life, or any thing he poſſeſſeth, his own, if power without right, daily make new, and abrogate the old fundamental ways of the land, which I now take to be the preſent caſe? Wherefore, when I came hither, I expected that you would have endeavoured to have ſatisfied me concerning theſe grounds which hinder me to anſwer to your pretended impeachment: but, ſince I ſee that nothing I can ſay will move you to it, (though negatives are not ſo naturally proved as affirmatives) yet I will ſhew you the reaſon why I am confident you cannot judge me, nor, indeed, the meaneſt man in *England*; for I will not, like you, without ſhewing a reaſon, ſeek to impoſe a belief upon my ſubjects.

" There is no proceeding juſt againſt any man, but what is warranted either by God's laws, or the municipal laws of the county where he lives[a]. Now I am moſt confident this day's proceeding cannot be warranted by God's law; for, on the contrary, the authority of obedience unto kings is clearly warranted, and ſtrictly commanded both in the Old and New Teſtament; which if denied, I am ready inſtantly to prove.

" And for the queſtion now in hand, there it is ſaid, that " Where the word of a king is, there is power; and who

[a] Hereabout I was ſtopped, and not ſuffered to ſpeak any more concerning *reaſons*.

may ſay unto him, What doſt thou?" Eccl. viii. 4. Then for the law of this land, I am no leſs confident that no learned lawyer will affirm, That an impeachment can lie againſt the king, they all going in his name: and one of their maxims is, That the king can do no wrong. Beſides, the law upon which you ground your proceedings, muſt be either old or new; if old, ſhew it; if new, tell what authority, warranted by the fundamental laws of the land, hath made it, and when. But how the Houſe of Commons can erect a Court of judicature, which was never one itſelf, (as is well known to all lawyers) I leave to God and the world to judge. And it were full as ſtrange, that they ſhould pretend to make laws without king or lords houſe, to any that have heard ſpeak of the laws of *England*.

"And admitting, but not granting, that the people of *England*'s commiſſion could grant your pretended power, I ſee nothing you can ſhew for that; for certainly you never aſked the queſtion of the tenth man in the kingdom: and in this way you manifeſtly wrong even the pooreſt ploughman, if you demand not his free conſent; nor can you pretend any colour for this your pretended commiſſion, without the conſent at leaſt of the major part of every man in *England*, of whatſoever quality or condition, which I am ſure you never went about to ſeek; ſo far are you from having it. Thus you ſee that I ſpeak not for my own right alone, as I am your king, but alſo for the true liberty of all my ſubjects; which conſiſts not in the power of government, but in living under ſuch laws, ſuch a government, as may give themſelves the beſt aſſurance of their lives, and property of their goods. Nor in this muſt or do I forget the privileges of both houſes of parliament, which this day's proceedings do not only violate, but likewiſe occaſion the greateſt breach of their publick faith, that (I believe) ever was heard of: with which I am far from charging the two houſes; for all pretended crimes laid againſt me bear date long before this treaty at *Newport*, in which I have concluded as much as in me lay, and hopefully expecting the houſes agreement thereunto, I was ſuddenly ſurpriſed and hurried from thence as a priſoner: upon which account I am againſt my will brought hither; where, ſince I am come, I cannot but, to my power, defend the ancient laws and liberties of this kingdom, together with my own juſt right. Then, for any thing I can ſee, the higher houſe is totally excluded. And for the Houſe of Commons, it is too well known that the major part of them are detained or deterred from ſitting; ſo as, if I had no other, this were

ſufficient

ſufficient for me to proteſt againſt the lawfulneſs of your pretended court. Beſides all this, the peace of the kingdom is not the leaſt in my thoughts; and what hopes of ſettlement is there, ſo long as power reigns without rule or law, changing the whole frame of that government under which this kingdom hath flouriſhed for many hundred years? (Nor will I ſay what will fall out, in caſe this lawleſs, unjuſt proceeding againſt me does go on.) And believe it, the Commons of *England* will not thank you for this change; for they will remember how happy they have been of late years under the reign of Queen *Elizabeth*, the king my father, and my ſelf, until the beginning of theſe unhappy troubles, and will have cauſe to doubt that they ſhall never be ſo happy under any new. And by this time it will be too ſenſibly evident that the arms I took up were only to defend the fundamental laws of this kingdom, againſt thoſe who have ſuppoſed my power hath totally changed the ancient government.

"Thus having ſhewed you briefly the reaſons why I cannot ſubmit to your pretended authority, without violating the truſt which I have from God for the welfare and liberty of my people; I expect from you either clear reaſons to convince my judgment, ſhewing me that I am in an error, (and then I will truly anſwer) or that you will withdraw your proceedings."

This I intended to ſpeak in Weſtminſter Hall, *on* Monday, January *the* 22*d; but, againſt reaſon, was hindered to ſhew my reaſons.*

ON *Tueſday*, the 23d of *January*, the king comes in with his guard, looks with an auſtere countenance upon the Court, and ſits down.

Mr. Cook, *Solicitor General.* May it pleaſe your lordſhip, my Lord Preſident; this is now the third time that, by the great grace and favour of this high Court, the priſoner hath been brought to the bar before any iſſue joined in the cauſe. My lord, I did at the firſt Court exhibit a charge againſt him, containing the higheſt treaſon that ever was wrought upon the theatre of *England*; That a king of *England*, truſted to keep the law, that had taken an oath ſo to do, that had tribute paid him for that end, ſhould be guilty of a wicked deſign to ſubvert and deſtroy our laws, and introduce an arbitrary and tyrannical government, in defiance of the Parliament and their authority, ſet up his ſtandard for war againſt his Parliament and people: and I did

did humbly pray, in the behalf of the people of *England*, that he might ſpeedily be required to make an anſwer to the charge.

But, my lord, inſtead of making any anſwer, he did then diſpute the authority of this high Court. Your lordſhip was pleaſed to give him a further day, to conſider, and to put in his anſwer; which day being yeſterday, I did humbly move, that he might be required to give a direct and poſitive anſwer, either by denying or confeſſion of it: but, my lord, he was then pleaſed for to demur to the juriſdiction of the Court; which the Court did then overrule, and commanded him to give a direct and poſitive anſwer. My lord, beſides this great delay of juſtice, I ſhall now humbly move your lordſhip for ſpeedy judgment againſt him. My lord, I might preſs your lordſhip upon the whole, that according to the known rules of the law of the land, That if a priſoner ſhall ſtand as contumacious in contempt, and ſhall not put in an iſſuable plea, guilty or not guilty of the charge given againſt him, whereby he may come to a fair trial; That, as by an implicit confeſſion, it may be taken *pro confeſſo*, as it hath been done to thoſe who have deſerved more favour than the priſoner at the bar has done. But beſides, my lord, I ſhall humbly preſs your lordſhip upon the whole fact. The Houſe of Commons, the ſupreme authority and juriſdiction of the kingdom, they have declared, That it is notorious, that the matter of the charge is true, as it is in truth, my lord, as clear as cryſtal, and as the ſun that ſhines at noon-day: which if your lordſhip and the Court be not ſatisfied in, I have notwithſtanding, on the people of *England*'s behalf, ſeveral witneſſes to produce. And therefore I do humbly pray, and yet I muſt confeſs it is not ſo much I as the innocent blood that hath been ſhed, the cry whereof is very great for juſtice and judgment; and therefore I do humbly pray, that ſpeedy judgment be pronounced againſt the priſoner at the bar.

Ld. Preſident. Sir, you have heard what is moved by the counſel on the behalf of the kingdom againſt you. Sir, you may well remember, and if you do not, the Court cannot forget what dilatory dealings the Court hath found at your hands. You were pleaſed to propound ſome queſtions, you have had our reſolution upon them. You were told, over and over again, That the Court did affirm their own juriſdiction; that it was not for you, nor any other man, to diſpute the juriſdiction of the ſupreme and higheſt authority of *England*, from which there is no appeal, and

touching

touching which there muſt be no diſpute: yet you did perſiſt in ſuch carriage, as you gave no manner of obedience, nor did you acknowledge any authority in them, nor the high Court that conſtituted this Court of juſtice.

Sir, I muſt let you know from the Court, that they are very ſenſible of theſe delays of yours, and that they ought not, being thus authoriſed by the ſupreme Court of *England*, to be thus trifled withal; and that they might in juſtice, if they pleaſed, and according to the rules of juſtice, take advantage of theſe delays, and proceed to pronounce judgment againſt you: yet nevertheleſs they are pleaſed to give direction, and on their behalfs I do require you, that you make a poſitive anſwer unto this charge that is againſt you, Sir, in plain terms, for juſtice knows no reſpect of perſons; you are to give your poſitive and final anſwer in plain *Engliſh*, whether you be guilty or not guilty of theſe treaſons laid to your charge.

The king, after a little pauſe, ſaid,

When I was here yeſterday, I did deſire to ſpeak for the liberties of the people of *England*; I was interrupted: I deſire to know yet whether I may ſpeak freely or not.

Ld. Preſident. Sir, you have had the reſolution of the Court upon the like queſtion the laſt day; and you were told, that having ſuch a charge of ſo high a nature againſt you, and your work was that you ought to acknowledge the juriſdiction of the Court and to anſwer to your charge. Sir, if you anſwer to your charge, which the Court gives you leave now to do, though they might have taken the advantage of your contempt; yet, if you be able to anſwer to your charge, when you have once anſwered, you ſhall be heard at large, make the beſt defence you can. But, Sir, I muſt let you know from the Court, as their commands, that you are not to be permitted to iſſue out into any other diſcourſes, till ſuch time as you have given a poſitive anſwer concerning the matter that is charged upon you.

King. For the charge, I value it not a ruſh, it is the liberty of the people of *England* that I ſtand for. For me to acknowledge a new Court that I never heard of before, I that am your king, that ſhould be an example to all the people of *England* for to uphold juſtice, to maintain the old laws; indeed I do not know how to do it. You ſpoke very well the firſt day that I came here, (on *Saturday*) of the obligations that I had laid upon me by God, to the maintenance of the liberties of my people; the ſame obligation you ſpake of I do acknowledge to God that I owe to him, and

and to my people, to defend as much as in me lies the ancient laws of the kingdom: therefore, until that I may know that this is not againſt the fundamental laws of the kingdom, by your favour I can put in no particular anſwer. If you will give me time, I will ſhew you my reaſons why I cannot do it, and this——

Here being interrupted, he ſaid,

By your favour, you ought not to interrupt me: how I came here I know not, there's no law for it to make your king your priſoner. I was in a treaty upon the public faith of the kingdom, that was the known——— two houſes of parliament that was the repreſentative of the kingdom; and when that I had almoſt made an end of the treaty then I was hurried away, and brought hither: and therefore———

Here the Lord Preſident ſaid, Sir, you muſt know the pleaſure of the Court.

King. By your favour, Sir.

Ld. Preſident. Nay, Sir, by your favour, you may not be permitted to fall into thoſe diſcourſes; you appear as a delinquent, you have not acknowledged the authority of the Court, the Court craves it not of you: but once more they command you to give your poſitive anſwer.—Clerk, do your duty.

King. Duty, Sir!

The clerk reads,

"*Charles Stuart*, King of *England*, you are accuſed in the behalf of the Commons of *England* of divers high crimes and treaſons, which charge hath been read unto you; the Court now requires you to give your poſitive and final anſwer, by way of confeſſion or denial of the charge."

King. Sir, I ſay again to you, ſo that I might give ſatisfaction to the people of *England* of the clearneſs of my proceeding, not by way of anſwer, not in this way, but to ſatisfy them that I have done nothing againſt that truſt that hath been committed to me, I would do it: but to acknowledge a new Court, againſt their privileges, to alter the fundamental laws of the kingdom, Sir, you muſt excuſe me.

Ld. Preſident. Sir, this is the third time that you have publickly diſowned this Court, and put an affront upon it: how far you have preſerved the privileges of the people, your actions have ſpoke it; but truly, Sir, mens' intentions ought to be known by their actions; you have written your meaning in bloody characters throughout the whole kingdom. But, Sir, you underſtand the pleaſure of the Court.

—Clerk,

Clerk, record the default.————And, gentlemen, you that took charge of the priſoner, take him back again.

King. I will only ſay this one word more to you: if it were only my own particular, I would not ſay any more, nor interrupt you.

Ld. Preſident. Sir, you have heard the pleaſure of the Court, and you are (notwithſtanding you will not underſtand it) to find that you are before a Court of juſtice.

ON the 24th. of *January* the commiſſioners proceeded to take the examination of witneſſes in writing, in the Painted Chamber, and on the 25th the witneſſes atteſted the truth of their depoſitions, in open Court upon oath.

Several depoſed, that the king began the war in the month of *July*, 1642, and others, that he charged at the head of his troops at *Edge hill*, *Cropredy-Bridge*, *Newbury*, *Naſeby*, *&c.* whereby they propoſed to ſhew that his majeſty was the author of the war, and the occaſion of the blood that had been ſhed.

They endeavoured alſo to prove that the king was inſincere in his treaties with the parliament; for which purpoſe, *Henry Gooche*, of *Gray's Inn*, was produced as a witneſs, who depoſed that he waited on his majeſty at the *Iſle* of *Wight*, and acquainted him, that he had many friends: that, ſince he was pleaſed to juſtify the parliament in taking up arms, moſt of the *Preſbyterian* party, both ſoldiers and others, would ſtick cloſe to him. To which the king anſwered, that he would have his old friends know, though for the preſent he was content to give the parliament leave to call their own war what they pleaſed, yet that he neither did at that time, or ever could decline the juſtice of his own cauſe: the deponent alſo told the king, that his buſineſs was much retarded, becauſe his friends wanted commiſſions to act under, to which the king anſwered, while he was engaged in a treaty with the parliament, he could not in honour iſſue out any commiſſions; but if the deponent would apply to his ſon they might have any commiſſion they deſired, and he would order the marquis of *Hertford*, to write to his ſon in his name.

Richard Price, a *London* ſcrivener, alſo depoſed, that the king's agent in *London* tampering with the Independents, to draw them off from the parliament, and being diſcovered, the committee of ſafety directed thoſe that were tampered with, to comply ſeemingly with the king's agents: and the deponent, having obtained a ſafe conduct thereupon, attended the king at *Oxford* in *January* 1743, to treat with his majeſty on that ſubject. When his majeſty obſerved to the deponent, that

that the Independents were the moſt active men in the kingdom againſt him, and deſired the deponent would endeavour the bringing them over to his intereſt; promiſing on the word of a king, if they would join him, and be as active for him, againſt the parliament, as they had been againſt him, he would grant them whatever freedom they could deſire.

Saturday 27th *January*, as the king came in, a cry was made in the hall for Execution, Juſtice, Execution.

King. I ſhall deſire a word to be heard a little, and I hope I ſhall give no occaſion of interruption.

Ld. Preſident. You may anſwer in your time; hear the Court firſt.

King. If it pleaſe you, Sir, I deſire to be heard, and I ſhall not give any occaſion of interruption, and it is only in a word: a ſudden judgment—

Ld. Preſident. Sir, you ſhall be heard in due time, but you are to hear the Court firſt.

King. Sir, I deſire, it will be in order to what I believe the Court will ſay; and therefore, Sir, an haſty judgment is not ſo ſoon recalled.

Ld. Preſident. Sir, you ſhall be heard before the judgment be given, and in the mean time you may forbear.

King. Well, Sir, ſhall I be heard before the judgment be given?

Ld. Preſident. Gentlemen, it is well known to all, or moſt of you here preſent, that the Priſoner at the bar hath been ſeveral times convened and brought before the Court to make anſwer to a charge of treaſon, and other high crimes exhibited againſt him in the name of the people of *England;*[a] to which charge being required to anſwer, he hath been ſo far from obeying the commands of the Court by ſubmitting to their juſtice, as he began to take upon him to offer reaſoning and debate unto the authority of the Court, and of the high Court that conſtituted them to try and judge him: but being over-ruled in that, and required to make his anſwer, he was ſtill pleaſed to continue contumacious, and to refuſe to ſubmit or anſwer. Hereupon the Court, that they may not be wanting to themſelves, to the truſt repoſed in them, nor that any man's wilfulneſs prevent juſtice, they have thought fit to take the matter into their conſideration; they have conſidered of the charge, they have conſidered of the contumacy, and of that confeſſion, which in law doth ariſe upon that

[a] Here a lady (Lady *Fairfax*) interrupted the court, ſaying, 'Not half the people;' but ſhe was ſoon ſilenced.

that contumacy: they have likewiſe conſidered of the notoriety of the fact charged upon this priſoner, and upon the whole they are reſolved, and have agreed upon a ſentence to be now pronounced againſt this priſoner: but in reſpect he doth deſire to be heard, before the ſentence be read and pronounced, the Court hath reſolved that they will hear him. Yet, Sir, thus much I muſt tell you before-hand, which you have been minded of at other Courts, that if that you have to ſay, be to offer any debate concerning juriſdiction, you are not to be heard in it; you have offered it formerly, and you have indeed ſtruck at the root, that is, the power and ſupreme authority of the Commons of *England*, which this Court will not admit a debate of; and which indeed is an irrational thing in them to do, being a Court that acts upon authority derived from them, that they ſhould preſume to judge upon their ſuperior, from whom there is no appeal. But, Sir, if you have any thing to ſay in defence of yourſelf concerning the matter charged, the Court hath given me in command to let you know they will hear you.

King. Since that I ſee that you will not hear any thing of debate concerning that which I confeſs I thought moſt material for the peace of the kingdom, and for the liberty of the ſubject, I ſhall wave it; I ſhall ſpeak nothing to it, but only I muſt tell you, that this many a day all things have been taken away from me, but that, that I call more dear to me than my life, which is my conſcience and my honour: and if I had reſpect to my life more than the peace of the kingdom, the liberty of the ſubject, certainly I ſhould have made a particular defence for myſelf; for by that at leaſtwiſe I might have delayed an ugly ſentence, which I believe will paſs upon me. Therefore certainly, Sir, as a man, that hath ſome underſtanding, ſome knowledge of the world, if that my true zeal to my country had not over-borne the care that I have of my own preſervation, I ſhould have gone another way to work than that I have done. Now, Sir, I conceive, that an haſty ſentence once paſſed, may ſooner be repented than recalled; and truly the ſelf-ſame deſire that I have for the peace of the kingdom, and the liberty of the ſubject, more than my own particular, does make me at laſt deſire, that having ſomething for to ſay that concerns both, I deſire before ſentence be given, that I may be heard in the Painted-chamber before the Lords and Commons. This delay cannot be prejudicial to you, whatſoever I ſay; if that I ſay no reaſon, thoſe that hear me muſt be judges; I cannot be judge of that, which I have: if it be reaſon, and really for the welfare of the kingdom, and the liberty of the ſubject,

ject, I am ſure on't, very well it is worth the hearing; therefore I do conjure you, as you love that which you pretend, I hope it's real, the liberty of the ſubject, the peace of the kingdom, that you will grant me the hearing, before any ſentence be paſt. I only deſire this, that you will take this into your conſideration, it may be you have not heard of it before-hand; if you will, I will retire, and you may think of it: but if I cannot get this liberty, I do here proteſt, that ſo fair ſhows of liberty and peace, are pure ſhows, and not otherwiſe, ſince you will not hear your king.

Ld. Preſident. Sir, you have now ſpoken.

King. Yes, Sir.

Ld. Preſident. And this that you have ſaid is a further declining of the juriſdiction of this Court, which was the thing wherein you were limited before.

King. Pray excuſe me, Sir, for my interruption, becauſe you miſtake me; it is not a declining of it, you do judge me before you hear me ſpeak: I ſay it will not, I do not decline it, though I cannot acknowledge the juriſdiction of this Court; yet, Sir, to this give me leave to ſay, I would do it though I do not by this acknowledge it, I do proteſt it is not the declining of it, ſince I ſay, if that I do ſay any thing, but that which is for the peace of the kingdom, and the liberty of the ſubject, then the ſhame is mine. Now I deſire that you will take this into your conſideration; if you will, I will withdraw.

Ld. Preſident. Sir, this is not altogether new that you have moved unto us, not altogether new to us, though it is the firſt time in perſon you have offered it to the Court. Sir, you ſay you do not decline the juriſdiction of the Court.

King. Not in this that I have ſaid.

Ld. Preſident. I underſtand you well, Sir; but nevertheleſs, that which you have offered, ſeems to be contrary to that ſaying of yours; for the Court are ready to give a ſentence: it is not as you ſay, that they will not hear their king; for they have been ready to hear you, they have patiently waited your pleaſure for three Courts together, to hear what you would ſay to the people's charge againſt you, to which you have not vouchſafed to give any anſwer at all. Sir, this tends to a further delay: truly, Sir, ſuch delays as theſe, neither may the kingdom, nor juſtice well bear: you have had three ſeveral days to have offered in this kind what you would have pleaſed. This Court is founded upon that authority of the Commons of *England*, in whom reſts the ſupreme juriſdiction; that which you now tender, is to have another juriſdiction, and a co-ordinate juriſdiction. I

know very well you expreſs yourſelf, Sir, that notwithſtanding that you would offer to the Lords and Commons in the Painted-chamber, yet nevertheleſs you would proceed on here, I did hear you ſay ſo. But, Sir, that you would offer there, whatever it is, it muſt needs be in delay of the juſtice here; ſo as if the Court be reſolved, and prepared for the ſentence, this that you offer they are not bound in juſtice to grant: but, Sir, according to what you ſeem to deſire, and becauſe you ſhall know the further pleaſure of the Court, upon that which you have moved, the Court will withdraw for a time.

King. Shall I withdraw?

Ld. Preſident. Sir, you ſhall know the pleaſure of the Court preſently. The Court withdraws for half an hour into the Court of Wards.

Serjeant at Arms. The Court gives command, that the priſoner be withdrawn: and they give order for his return again.

The Court withdraws for half an hour, and returns.

Ld. Preſident. Serjeant at Arms, ſend for your priſoner.

Sir, you were pleaſed to make a motion here to the Court to offer a deſire of yours, touching the propounding of ſomewhat to the Lords in the Painted-chamber, for the peace of the kingdom: Sir, you did, in effect, receive an anſwer before the Court adjourned; truly, Sir, their withdrawing and adjournment was *pro formâ tantum;* for it did not ſeem to them that there was any difficulty in the thing: they have conſidered of what you have moved, and have conſidered of their own authority, which is founded, as hath been often ſaid, upon the ſupreme authority of the Commons of *England*, aſſembled in parliament: the Court acts according to their commiſſion. Sir, the return I have to you from the Court, is this: that they have been too much delayed by you already, and this that you now offer, hath occaſioned ſome little further delay; and they are judges appointed by the higheſt judges; and judges are no more to delay, than they are to deny juſtice: they are good words in the great old Charter of *England; Nulli negabimus, nulli vendemus, nulli differemus juſtitiam.* There muſt be no delay; but the truth is, Sir, and ſo every man here obſerves it, that you have much delayed them in your contempts and defaults, for which they might long ſince have proceeded to judgment againſt you; and notwithſtanding what you have offered, they are reſolved to proceed to puniſhment, and to judgment, and that is their unanimous reſolution.

King.

King. Sir, I know it is in vain for me to diſpute, I am no ſceptic for to deny the power that you have; I know that you have power enough: Sir, I confeſs, I think it would have been for the kingdom's peace, if you would have taken the pains for to have ſhewn the lawfulneſs of your power; for this delay that I have deſired, I confeſs it is a delay, but it is a delay very important for the peace of the kingdom; for it is not my perſon that I look on alone, it is the kingdom's welfare, and the kingdom's peace; it is an old ſentence, That we ſhould think long, before we reſolve of great matters. Therefore, Sir, I do ſay again, that I do put at your doors all the inconveniency of an haſty ſentence. I confeſs I have been here now, I think, this week; this day eight days was the day I came here firſt, but a little delay of a day or two further may give peace; whereas an haſty judgment may bring on that trouble and perpetual inconveniency to the kingdom, that the child that is unborn may repent it: and therefore again, out of the duty I owe to God, and to my country, I do deſire that I may be heard by the Lords and Commons in the Painted-chamber, or any other chamber that you will appoint me.

Ld. Preſident. Sir, you have been already anſwered to what you even now moved, being the ſame you moved before, ſince the reſolution and the judgment of the Court in it: and the Court now requires to know whether you have any more to ſay for yourſelf, than you have ſaid, before they proceed to ſentence?

King. I ſay this, Sir, that if you will hear me, if you will but give this delay, I doubt not but I ſhall give ſome ſatisfaction to you all here, and to my people after that; and therefore I do require you, as you will anſwer it at the dreadful day of judgment, that you will conſider it once again.

Ld. Preſident. Sir, I have received directions from the Court.

King. Well, Sir.

Ld. Preſident. If this muſt be re-enforced, or any thing of this nature, your anſwer muſt be the ſame; and they will proceed to ſentence, if you have nothing more to ſay.

King. Sir, I have nothing more to ſay, but I ſhall deſire, that this may be entered what I have ſaid.

Ld. Preſident. The Court then, Sir, have ſomething elſe to ſay to you; which, although I know it will be very unacceptable, yet notwithſtanding they are willing, and are reſolved to diſcharge their duty.

Sir,

Sir, you ſpeak very well of a precious thing, which you call peace: and it had been much to be wiſhed that God had put it into your heart, that you had as effectually and really endeavoured and ſtudied the peace of the kingdom, as now in words you ſeem to pretend: but, as you were told the other day, actions muſt expound intentions; yet actions have been clean contrary. And truly, Sir, it doth appear plainly enough to them, that you have gone upon very erroneous principles: the kingdom hath felt it to their ſmart; and it will be no eaſe to you to think of it: for, Sir, you have held yourſelf, and let fall ſuch language, as if you had been no ways ſubject to the law, or that the law had not been your ſuperior. Sir, the Court is very ſenſible of it, and I hope ſo are all the underſtanding people of *England*, that the law is your ſuperior; that you ought to have ruled according to the law; you ought to have done ſo. Sir, I know very well your pretence hath been that you have done ſo: but, Sir, the difference hath been, who ſhall be the expoſitors of this law: Sir, whether you and your party, out of Courts of Juſtice, ſhall take upon them to expound law, or the Courts of juſtice, who are the expounders? nay, the ſovereign and the high Court of Juſtice, the Parliament of *England*, that are not only the higheſt expounders, but the ſole makers of the law? Sir, for you to ſet yourſelf with your ſingle judgment, and thoſe that adhere unto you, to ſet yourſelf againſt the higheſt Court of Juſtice, that is not law. Sir, as the law is your ſuperior, ſo truly, Sir, there is ſomething that is ſuperior to the law, and that is indeed the parent or author of the law, and that is the people of *England:* for, Sir, as they are thoſe that at the firſt (as other countries have done) did chuſe to themſelves this form of government even for juſtice ſake, that juſtice might be adminiſtered, that peace might be preſerved; ſo, Sir, they gave laws to their governors, according to which they ſhould govern: and if thoſe laws ſhould have proved inconvenient or prejudicial to the public, they had a power in them, and reſerved to themſelves, to alter as they ſhould ſee cauſe. Sir, it is very true what ſome of your ſide have ſaid, *Rex non habet parem in regno*, ſo they: this Court will ſay the ſame, while king, that you have not your peer in ſome ſenſe, for you are *major ſingulis;* but they will aver again that you are *minor univerſis.* And the ſame author tells you, that *non debet eſſe major ei in regno ſuo in exhibitione juris, minimus autem eſſe debet in judicio ſuſcipiendo.*

This we know to be law, *Rex habet ſuperiorem, Deum & Legem etiam & Curiam*, ſo ſays the ſame author. And truly, Sir, he makes bold to go a little further, *Debent ei ponere frænum;*

They ought to bridle him. And, Sir, we know very well the ſtories of old: thoſe wars that were called the barons wars, when the nobility of the land did ſtand out for the liberty and property of the ſubject, and would not ſuffer the kings, that did invade, to play the tyrant freer, but call them to account for it; we know that truth, that they did *frænum ponere*. But, Sir, if they do forbear to do their duty now, and are ſo mindful of their honour, and the kingdom's good as the barons of *England* of old were, certainly the commons of *England* will not be unmindful of what is for their preſervation, and for their ſafety; *Juſtitiæ fruendi cauſa Reges conſtituti ſunt*. This we learn: The end of having kings, or any other governors, it is for the enjoying of juſtice; that is the end. Now, Sir, if ſo be the king will go contrary to the end of his government; Sir, he muſt underſtand that he is but an officer in truſt, and he ought to diſcharge that truſt; and they are to take order for the animadverſion and puniſhment of ſuch an offending governor.

This is not law of yeſterday, Sir, (ſince the time of the diviſion betwixt you and your people) but it is law of old. And we know very well the authors and the authorities that do tell us what the law was in that point upon the election of kings, upon the oath that they took unto their people: And if they did not obſerve it, there were thoſe things called parliaments; the parliaments were they that were to adjudge (the very words of the author) the plaints and wrongs done of the king and queen, or their children; ſuch wrongs eſpecially, when the people could have no where elſe any remedy. Sir, that hath been the people of *England*'s caſe: they could not have their remedy elſewhere but in parliament.

Sir, parliaments were ordained for that purpoſe, to redreſs the grievances of the people; that was their main end. And truly, Sir, if ſo be that the kings of *England* had been rightly mindful of themſelves, they were never more in majeſty and ſtate than in the parliament: but how forgetful ſome have been, ſtories have told us: we have a miſerable, a lamentable, a ſad experience of it. Sir, by the laws of *England*, I ſpeak theſe things the rather to you becauſe you were pleaſed to let fall the other day, you thought you had as much knowledge in the law as moſt gentlemen in *England*: It is very well, Sir. And truly, Sir, it is very fit for the gentlemen of *England* to underſtand that law under which they muſt live, and by which they muſt be governed. And then, Sir, the ſcripture ſays, 'They that know their maſter's will and do it not:' what follows? The law is your maſter, the acts of parliament.

The

The parliaments were to be kept antiently, we find in our old author, twice in the year, that the ſubject upon any occaſion might have a ready remedy and redreſs for his grievance. Afterwards, by ſeveral acts of parliament in the days of your predeceſſor *Edward* the third, they ſhould have been once a year. Sir, what the intermiſſion of parliaments hath been in your time, it is very well known and the ſad conſequences of it; and what in the interim inſtead of theſe parliaments hath been by you by an high and arbitrary hand introduced upon the people, that likewiſe hath been too well known and felt. But when God by his providence had ſo far brought it about, that you could no longer decline the calling of a parliament, Sir, yet it will appear what your ends were againſt the antient and your native kingdom of *Scotland*: the parliament of *England* not ſerving your ends againſt them, you were pleaſed to diſſolve it. Another great neceſſity occaſioned the calling of this Parliament; and what your deſigns, and plots, and endeavours all along have been, for the cruſhing and confounding of this parliament, hath been very notorious to the whole kingdom. And truly, Sir, in that you did ſtrike at all; that had been a ſure way to have brought about that that this charge lays upon you, your intention to ſubvert the fundamental laws of the land: for the great bulwark of the liberties of the people is the parliament of *England*; and to ſubvert and root up that, which your aim hath been to do, certainly at one blow you had confounded the liberties and the property of *England*.

Truly, Sir, it makes me call to mind; I cannot forbear to expreſs it; for, Sir, we muſt deal plainly with you, according to the merits of your cauſe, ſo is our commiſſion: it makes me call to mind, (theſe proceedings of yours) that that we read of a great *Roman* emperor, by the way let us call him a ~~great~~ *Roman* tyrant, *Caligula*, that wiſhed that the people of *Rome* had had but one neck, that at one blow he might cut it off. And your proceedings have been ſomewhat like to this: for the body of the people of *England* hath been (and where elſe) repreſented but in the parliament; and could you have but confounded that, you had at one blow cut off the neck of *England*. But God hath reſerved better things for us, and hath pleaſed for to confound your deſigns, and to break your forces, and to bring your perſon into cuſtody, that you might be reſponſible to juſtice.

Sir, we know very well that it is a queſtion much on your ſide preſſed, By what precedent we ſhall proceed? Truly, Sir, for precedents, I ſhall not upon theſe occaſions inſtitute any long diſcourſe; but it is no new thing to cite precedents al-

moſt of all nations, where the people (when power hath been in their hands) have made bold to call their kings to account; and where the change of government hath been upon occaſion of the tyranny and miſgovernment of thoſe that have been placed over them. I will not ſpend time to mention either *France* or *Spain*, or the empire, or other countries; volumes may be written of it. But truly, Sir, that of the kingdom of *Arragon*, I ſhall think ſome of us have thought upon it, where they have the Juſtice of *Arragon*, that is, a man, *tanquam in medio poſitus*, betwixt the king of *Spain* and the people of the country; that if wrong be done by the king, he that is the king of *Arragon*, the juſtice, hath power to reform the wrong; and he is ackhowledged to be the king's ſuperior, and he is the grand preſerver of their privileges, and hath proſecuted kings npon their miſcarriages.

Sir, what the tribunes of *Rome* were heretofore, and what the *Ephori* were to the *Lacedemonian* ſtate, we know that is the parliament of *England* to the *Engliſh* ſtate: and though *Rome* ſeemed to loſe its liberty when once the emperors were; yet you ſhall find ſome famous acts of juſtice even done by the ſenate of *Rome*; that great tyrant of his time, *Nero*, condemned and judged by the ſenate. But truly, Sir, to you I ſhould not need to mention theſe foreign examples and ſtories: if you look but over *Tweed*, we find enough in your native kingdom of *Scotland*: if we look to your firſt king *Fergus*, that your ſtories make mention of, he was an elective king; he died, and left two ſons, both in their minority; the kingdom made choice of their uncle, his brother, to govern in the minority. Afterwards, the elder brother, giving ſmall hopes to the people that he would rule or govern well, ſeeking to ſupplant that good uncle of his that governed then juſtly, they ſet the elder aſide and took the younger. Sir, if I ſhould come to what your ſtories make mention of; you know very well you are the hundred and ninth king of *Scotland*: for not to mention ſo many kings as that kingdom, according to their power and privilege, have made bold to deal withal, ſome to baniſh, and ſome to impriſon, and ſome to put to death, it would be too long; and as one of your own authors ſays, it would be too long to recite the manifold examples that your own ſtories make mention of. *Reges, &c.* (ſay they) we do create; we created kings at firſt: *Leges, &c.* we impoſed laws upon them. And as they are choſen by the ſuffrages of the people at the firſt; ſo upon juſt occaſion, by the ſame ſuffrages they may be taken down again. And we will be bold to ſay, that no kingdom hath

yielded

yielded more plentiful experience than that your native kingdom of *Scotland* hath done, concerning the depoſition and the puniſhment of their offending and tranſgreſſing kings, &c.

It is not far to go for an example near you: your grandmother ſet aſide, and your father, an infant crowned. And the ſtate did it here in *England*: here hath not been a want of ſome examples. They have made bold (the parliament and the people of *England*) to call their kings to account: there are frequent examples of it in the *Saxons* time, the time before the conqueſt. Since the conqueſt there want not ſome precedents neither; king *Edward* the ſecond, king *Richard* the ſecond, were dealt with ſo by the parliament, as they were depoſed and deprived. And truly, Sir, whoever ſhall look into their ſtories, they ſhall not find the articles that are charged upon them, to come near to that height and capitalneſs of crimes that are laid to your charge; nothing near.

Sir, you were pleaſed to ſay the other day wherein they diſſent; and I did not contradict it. But take all together, Sir; if you were as the charge ſpeaks, and no otherwiſe, admitted king of *England:* but for that you were pleaſed then to alledge, how that almoſt for a thouſand years theſe things have been, ſtories will tell you, if you go no higher than the time of the conqueſt; if you do come down ſince the conqueſt, you are the twenty-fourth king from *William* the conqueror, you ſhall find one half of them to come merely from the ſtate and not merely upon the point of deſcent. It were eaſy to be inſtanced to you; but time muſt not be loſt that way. And truly, Sir, what a grave and learned Judge ſaid in his time, and well known to you, and is ſince printed for poſterity, That although there was ſuch a thing as a deſcent many times, yet the Kings of *England* ever held the greateſt aſſurances of their titles, when it was declared by parliament. And, Sir, your oath, the manner of your coronation, doth ſhew plainly, that the kings of *England*, although it is true, by the law the next perſon in blood is deſigned, yet if there were juſt cauſe to refuſe him, the people of *England* might do it. For there is a contract and a bargain made between the king and his people, and your oath is taken: and certainly, Sir, the bond is reciprocal; for as you are the liege lord, ſo they the liege ſubjects. And we know very well that hath been ſo much ſpoken of, *Ligeantia eſt duplex.* This we know now, the one tie, the one bond, is the bond of protection that is due from the ſovereign; the other is the bond of ſubjection that is due from the ſubject.

Sir, if this bond be once broken, farewel ſovereignty; *ſubjectio trahit, &c.*

Theſe things may not be denied, Sir: I ſpeak it rather, and I pray God it may work upon your heart, that you may be ſenſible of your miſcarriages. For whether you have been, as by your office you ought to be, a protector of *England*, or the deſtroyer of *England*, let all *England* judge, or all the world, that hath looked upon it. Sir, though you have it by inheritance in the way that is ſpoken of, yet it muſt not be denied that your office was an office of truſt, and indeed an office of the higheſt truſt, lodged in any ſingle perſon: for as you were the grand adminiſtrator of juſtice, and others were as your delagates, to ſee it done throughout your realms; if your greateſt office were to do juſtice, and preſerve people from wrong, and inſtead of doing that, you will be the great wrong-doer yourſelf; if inſtead of being a conſervator of the peace, you will be the grand diſturber of the peace, ſurely this is contrary to your office, contrary to your truſt. Now, Sir, if it be an office of inheritance, as you ſpeak of, your title by deſcent, let all men know that great offices are ſeizable and forfeitable, as if you had it but for a year, and for your life. Therefore, Sir, it will concern you to take into your ſerious conſideration your great miſcarriages in this kind.

Truly, Sir, I ſhall not particularize the many miſcarriages of your reign whatſoever, they are famouſly known: it had been happy for the kingdom, and happy for you too, if it had not been ſo much known, and ſo much felt, as the ſtory of your miſcarriages muſt needs be, and hath been already.

Sir, that which we are now upon, by the command of the higheſt Court, hath been and is to try and judge you for theſe great offences of yours. Sir, the charge hath called you tyrant, a traitor, a murderer, and a public enemy to the commonwealth of *England*. Sir, it had been well if that any of theſe terms might rightly and juſtly have been ſpared, if any one of them at all.

King. Ha!

Ld. Preſident. Truly, Sir, we have been told, *Rex eſt dum bene regit, tyrannus qui populum opprimit:* and if ſo be that be the definition of a tyrant, then ſee how you come ſhort of it in your actions, whether the higheſt tyrant, by that way of arbitrary government, and that you have ſought for to introduce, and that you have ſought to put, you were putting upon the people? whether that was not as high an act of

tyranny

tyranny as any of your predeceſſors were guilty of, nay, many degrees beyond it?

Sir, the term traitor cannot be ſpared. We ſhall eaſily agree it muſt denote and ſuppoſe a breach of truſt; and it muſt ſuppoſe it to be done to a ſuperior. And therefore, Sir, as the people of *England* might have incurred that reſpecting you, if they had been truly guilty of it, as to the definition of law; ſo on the other ſide, when you did break your truſt to the kingdom, you did break your truſt to your ſuperior: for the kingdom is that for which you were truſted. And therefore, Sir, for this breach of truſt, when you are called to account, you are called to account by your ſuperiors. *Minimus ad majorem in judicium vocat.* And, Sir, the people of *England* cannot be ſo far wanting to themſelves, God having dealt ſo miraculouſly and glorioufly for them; but that having power in their hands, and their great enemy, they muſt proceed to do juſtice to themſelves and to you: for, Sir, the Court could heartily deſire, that you would lay your hand upon your heart, and conſider what you have done amiſs, that you would endeavour to make your peace with God. Truly, Sir, theſe are your *high crimes, tyranny* and *treaſon.*

There is a third thing too, if thoſe had not been, and that is *murder*, which is laid to your charge. All the *bloody murders* which have been committed ſince this time that the diviſion was betwixt you and your people, muſt be laid to your charge, which have been acted or committed in theſe late wars. Sir, it is an heinous and crying ſin: and truly, Sir, if any man will aſk us what puniſhment is due to a *murderer*, let God's law, let man's law ſpeak. Sir, I will preſume that you are ſo well read in ſcriptures, as to know what God himſelf hath ſaid concerning the ſhedding of man's blood; *Gen.* ix. *Numb.* xxxv. will tell you what the puniſhment is: and which this Court, in behalf of the whole kingdom, are ſenſible of, of that innocent blood that has been ſhed, whereby indeed the land ſtands ſtill defiled with that blood; and, as the text hath it, it can no way be cleanſed but with the ſhedding of the blood of him that ſhed this blood. Sir, we know no diſpenſation from this blood in that commandment "Thou ſhalt do no murder:" we do not know but that it extends to kings as well as to the meaneſt peaſants, the meaneſt of the people; the command is univerſal. Sir, God's law forbids it; man's law forbids it: nor do we know that there is any manner of exception, not even in man's laws, for the puniſhment of murder in you. It is true,

true, that in the caſe of kings, every private hand was not to put forth itſelf to this work, for their reformation and puniſhment: but, Sir, the people repreſented having power in their hands, had there been but one wilful act of murder by you committed, had power to have convened you, and to have puniſhed you for it.

But then, Sir, the weight that lies upon you in all thoſe reſpects that have been ſpoken, by reaſon of your tyranny, treaſon, breach of truſt, and the murders that have been committed; ſurely, Sir, it muſt drive you into a ſad conſideration concerning your eternal condition. As I ſaid at firſt, I know it cannot be pleaſing to you to hear any ſuch things as theſe are mentioned unto you from this Court, for ſo we do call ourſelves, and juſtify ourſelves to be a Court, and a high Court of Juſtice, authorized by the higheſt and ſolemneſt Court of the kingdom, as we have often ſaid: and although you do yet endeavour what you may to diſcourt us, yet we do take knowledge of ourſelves to be ſuch a Court as can adminiſter juſtice to you; and we are bound, Sir, in duty to do it. Sir, all I ſhall ſay before the reading of your ſentence, it is but this; the Court does heartily deſire that you will ſeriouſly think of thoſe evils that you ſtand guilty of. Sir, you ſaid well to us the other day you wiſhed us to have God before our eyes. Truly, Sir, I hope all of us have ſo: that God, who we know is a King of Kings, and Lord of Lords; that God with whom there is no reſpect of perſons; that God, who is the avenger of innocent blood: we have that God before us; that God, who does beſtow a curſe upon them that withhold their hands from ſhedding of blood, which is, in the caſe of guilty malefactors, and that do deſerve death: that God we have before our eyes. And were it not that the conſcience of our duty hath called us unto this place, and this employment, Sir, you ſhould have had no appearance of a Court here. But, Sir, we muſt prefer the diſcharge of our duty unto God, and unto the kingdom before any other reſpect whatſoever. And although at this time many of us, if not all of us, are ſeverely threatened by ſome of your party, what they intend to do, Sir, we do here declare, that we ſhall not decline or forbear the doing of our duty in the adminiſtration of juſtice, even to you, according to the merit of your offence, although God ſhould permit thoſe men to effect all that bloody deſign it had againſt us. Sir, we will ſay, and we will declare it, as thoſe children in the fiery furnace, that would not worſhip the golden image that *Nebuchadnezzar* had ſet up, "That

their

their God was able to deliver them from that danger that they were near unto:" but yet if he would not do it, yet notwithſtanding that they would not fall down and worſhip the image. We ſhall thus apply it: that though we ſhould not be delivered from thoſe bloody hands and hearts that conſpire the overthrow of the kingdom in general, of us in particular, for acting in this great work of juſtice, though we ſhould periſh in the work, yet by God's grace, and by God's ſtrength, we will go on with it. And this is all our reſolutions. Sir, I ſay for yourſelf, we do heartily wiſh and deſire that God would be pleaſed to give you a ſenſe of your ſins, that you would ſee wherein you have done amiſs, that you may cry unto him, that God would deliver you from blood-guiltineſs. A good king was once guilty of that particular thing, and was clear otherwiſe, ſaving in the matter of *Uriah*. Truly, Sir, the ſtory tells us that he was a repentant king; and it ſignifies enough, that he had died for it, but that God was pleaſed to accept of him, and to give him his pardon, "Thou ſhalt not die, but the child ſhall die: thou haſt given cauſe to the enemies of God to blaſpheme."

King. I would deſire only one word before you give ſentence; and that is, that you would hear me concerning thoſe great impoſitions, that you have laid to my charge.

Ld. Preſident. Sir, you muſt now give me leave to go on; for I am not far from your ſentence, and your time is now paſt.

King. But I ſhall deſire you will hear me a few words to you: for truly, whatever ſentence you will put upon me in reſpect of thoſe heavy imputations, that I ſee by your ſpeech you have put upon me; Sir, it is very true, that—

Ld. Preſident. Sir I muſt put you in mind: truly, Sir, I would not willingly, at this time eſpecially, interrupt you in any thing you have to ſay, that is proper for us to admit of; but, Sir, you have not owned us as a Court, and you look upon us as a ſort of people met together: and we know what language we receive from your party.

King. I know nothing of that.

Ld. Preſident. You diſavow us as a Court; and therefore for you to addreſs yourſelf to us, not acknowledging us as a Court to judge of what you ſay, it is not to be permitted. And the truth is, all along, from the firſt time you were pleaſed to diſavow and diſown us, the Court needed not to have heard you one word: for unleſs they be acknowledged a Court, and engaged, it is not proper for you to ſpeak. Sir, we have given you too much liberty already, and admitted of too much delay, and we may not admit of any farther.

Were

Were it proper for us to do it, we ſhould hear you freely, and we ſhould not have declined to hear you at large, what you could have ſaid or proved on your behalf, whether for totally excuſing, or for in part excuſing thoſe great and heinous charges, that in whole or in part are laid upon you. But, Sir, I ſhall trouble you no longer, your ſins are of ſo large a dimenſion, that if you do but ſeriouſly think of them, they will drive you to a ſad conſideration of it, and they may improve in you a ſad and ſerious repentance: and that the Court doth heartily wiſh that you may be ſo penitent for what you have done amiſs, that God may have mercy, at leaſtwiſe, upon your better part: truly, Sir, for the other, it is our parts and duties to do that, which the law preſcribes. We are not here *jus dare*, but *jus dicere*. We cannot be unmindful of what the ſcriptures tells us. "For to acquit the guilty is of equal abomination, as to condemn the innocent:" we may not acquit the guilty. What ſentence the law affirms to a traitor, tyrant, a murderer, and a public enemy to the country, the ſentence you are now to hear read unto you; and that is the ſentence of the Court.

The Lord Preſident commanded the ſentence to be read; make an *O yes*,[a] and command ſilence while the ſentence is read.

O yes made: ſilence commanded.

The clerk read the ſentence, which was drawn up in parchment:

"Whereas the Commons of *England* in parliament had appointed them an high Court of Juſtice, for the trying of *Charles Stuart*, king of *England*, before whom he had been three times convened, and at the firſt time a charge of high-treaſon, and other crimes and miſdemeanours, was read in the behalf of the kingdom of *England*, &c."

Here the clerk read the charge.

"Which charge being read unto him, as aforeſaid, he the ſaid *Charles Stuart* was required to give his anſwer: but he refuſed ſo to do;" and ſo expreſſed the ſeveral paſſages at his trial in refuſing to anſwer.

"For all which treaſons and crimes this Court doth adjudge, that the ſaid *Charles Stuart*, as a tyrant, traitor, murderer, and a public enemy, ſhall be put to death, by the ſevering his head from his body."

After the ſentence read, the Lord Preſident ſaid,

This ſentence now read and publiſhed, is the act, ſentence, judgment, and reſolution of the whole Court.

Here

[a] "*Oyez*," or hear ye, which is generally pronounced moſt unmeaningly "*O yes*."

Here the Court ſtood up, as aſſenting to what the preſident ſaid.

King. Will you hear me a word, Sir?

Ld. Preſident. Sir, you are not to be heard after the ſentence.

King. No, Sir?

Ld. Preſident. No, Sir; by your favour, Sir. Guard, withdraw your priſoner.

King. I may ſpeak after the ſentence—

By your favour, Sir, I may ſpeak after the ſentence ever.

By your favour, (hold!) the ſentence, Sir—

I ſay, Sir, I do——

I am not ſuffered for to ſpeak: expect what juſtice other people will have.

Then the Court roſe, and the king went with his guard to Sir *Robert Cotton*'s, and from thence to *Whitehall.*

As he paſſed down the ſtairs the ſoldiers ſcoffed at him, caſting the ſmoke of their tobacco (a thing very diſtaſteful unto him) in his face, and throwing their pipes in his way; and one more inſolent than the reſt, ſpitting in his face, his majeſty, according to his wonted heroic patience, took no more notice of ſo ſtrange and barbarous an indignity, than to wipe it off with his handkerchief.

As he paſſed along, hearing the rabble of ſoldiers crying out Juſtice! Juſtice! he ſaid, Poor ſouls, for a piece of money they would do ſo for their commanders.

Being brought firſt to Sir *Robert Cotton*'s, and thence to *Whitehall*, the ſoldiers continued their brutiſh carriage toward him, abuſing all that ſeemed to ſhew any reſpect, or any pity to him; not ſuffering him to reſt in his chamber, but thruſting in and ſmoaking their tobacco, and diſturbing his privacy.

But through all theſe trials (unuſual to princes) he paſſed with ſuch a calm and even temper, that he let fall nothing unbeſeeming his former majeſty and magnanimity.

In the evening, a member of the army acquainted the committee with his majeſty's deſire, that ſeeing they had paſſed a ſentence of death upon him, and his time might be nigh, he might ſee his children; and Dr. *Juxon*, biſhop of *London*, might be admitted to aſſiſt him in his private devotions, and receiving the ſacrament. Both which at length were granted.

And the next day, being Sunday, he was attended by the guard to *St. James*'s; where the biſhop preached before him upon theſe words, "In the day when God ſhall judge the ſecrets of all men by Jeſus Chriſt according to my goſpel."

THE

THE biſhop of *London* read divine ſervice before his majeſty; and the 27th of St. *Matthew*, the hiſtory of our Saviour's paſſion, being appointed by the church for that day, he gave the biſhop thanks for his ſeaſonable choice of the leſſon; but the biſhop acquainting him that it was the ſervice of the day, it comforted him exceedingly; then he proceeded to receive the holy ſacrament. His devotions being ended, he was brought from *St. James's* to *Whitehall*, by a regiment of foot, beſides his private guard of partiſans; the biſhop of *London* on the one hand, and colonel *Tomlinſon*, who had the charge of him, on the other, bareheaded. The guards marching a ſlow pace, the king bid them go faſter, ſaying, that he now went before them to ſtrive for an heavenly crown. Being come to the end of the park, he went up the ſtairs leading to the long-gallery in *Whitehall*, where formerly he uſed to lodge, and there finding an unexpected delay, the ſcaffold being not ready, he paſt moſt of the time in prayer. About twelve o'clock, (his majeſty having eat a bit of bread, and drank a glaſs of claret) colonel *Hacker*, with other officers and ſoldiers, brought the king, with the biſhop, and colonel *Tomlinſon*, through the Banqueting-houſe to the ſcaffold which was covered with black. A ſtrong guard of ſeveral regiments of horſe and foot were planted on all ſides, which hindered the near approach of the people, and the king from being heard, and therefore he chiefly directed his ſpeech to the biſhop and colonel *Tomlinſon*, as follows,

I SHALL be very little heard of any body elſe; I ſhall therefore ſpeak a word to you here: indeed, I could hold my peace very well, if I did not think that holding my peace would make ſome men think that I did ſubmit to the guilt, as well as the puniſhment; but I think it is my duty to God and my country to clear myſelf, both as an honeſt man, a good king, and a good chriſtian. I ſhall begin firſt with my innocency; in troth, I think it not very needful to inſiſt long upon this; for all the world knows that I did never begin a war with the two houſes of parliament; and I call God to witneſs, to whom I muſt ſhortly make an account, that I never did intend to incroach upon their privileges; they began upon me. It is the militia they began upon; they confeſſed the militia was mine, but they thought fit to have it from me: and, to be ſhort, if any body will look to the dates of commiſſions, of their commiſſions and mine, and likewiſe to the declarations, he will ſee clearly that they began theſe troubles, not I. So that as for the guilt of theſe enormous crimes that are laid againſt me, I hope in God

God that God will clear me of. I will not, I am in charity, and God forbid I ſhould lay it upon the two houſes of parliament, there is no neceſſity of either: I hope they are free of this guilt; for I believe, that ill inſtruments between them and me have been the cauſe of all this blood-ſhed; ſo that as I find myſelf clear of this, I hope, and pray God that they may too: yet, for all this, God forbid I ſhould be ſo ill a chriſtian, as not to ſay God's judgments are juſt upon me. Many times he doth pay juſtice by an unjuſt ſentence, that is ordinary. I will only ſay this, that an unjuſt ſentence that I ſuffered to take effect, is puniſhed now by an unjuſt ſentence upon me: ſo far I have ſaid to ſhew you that I am an innocent man.

Now, to ſhew you that I am a good chriſtian, I hope there is a good man (pointing to biſhop *Juxon*) that will bear me witneſs, that I have forgiven all the world, and even thoſe in particular that have been the chief cauſes of my death; who they are, God knows; I do not deſire to know: I pray God forgive them. But this is not all, my charity muſt go further; I wiſh that they may repent. For, indeed, they have committed a great ſin in that particular. I pray God, with St. *Stephen*, that it be not laid to their charge; nay not only ſo, but that they may take the right way to the peace of the kingdom: for my charity commands me not only to forgive particular men, but to endeavour, to the laſt gaſp, the peace of the kingdom. So, Sirs, I do wiſh, with all my ſoul (I hope there are ſome here that will carry it further) and endeavour the peace of the kingdom. Now, Sirs, I muſt ſhew you both how you are out of the way, and will put you in the way. Firſt, you are out of the way; for certainly all the ways you ever had yet, as I could find by any thing, is in the way of conqueſt; certainly this is an ill way; for conqueſt, Sir, in my opinion, is never juſt, except there be a good and juſt cauſe, either for matter of wrong, or a juſt title; and then, if you go beyond the firſt quarrel, that makes that unjuſt at the end that was juſt at firſt; if there be only matter of conqueſt, then it is a great robbery, as a pirate ſaid to *Alexander*, that he was a great robber, he was but a petty robber. And ſo, Sirs, I think the way you are in is much out of the way. Now, Sirs, to put you in the way; believe it, you ſhall never go right, nor God will never proſper you, until you give God his due, the king his due (that is, my ſucceſſor) and the people their due: I am as much for them as any of you. You muſt give God his due, by regulating rightly his Church (according to the ſcripture) which is now out of order; to ſet you in a way particularly

particularly now, I cannot; but only this, A national ſynod freely called, freely debated among themſelves, muſt ſettle this when every opinion is freely heard. For the king (Then turning to a gentleman that touched the ax, he ſaid, Hurt not the ax, that may hurt me.) Indeed I will not—the laws of the land will clearly inſtruct you for that; therefore, becauſe it concerns my own particular, I ſhall only give you a touch of it. For the people, truly I deſire their liberty and freedom as much as any body whatſoever; but I muſt tell you, that their liberty and freedom conſiſt in having government, thoſe laws by which their lives and their goods may be moſt their own. It is not their having a ſhare in government, that is nothing appertaining to them: a ſubject and a ſovereign are clean different things; and therefore until you do that, I mean, that you put the people in that liberty, as I ſay, certainly they will never enjoy themſelves.

Sirs, it was for this that now I am come here: if I would have given way to an arbitrary way, to have all laws changed according to the power of the ſword, I needed not to have come here; and therefore I tell you (and I pray God it be not laid to your charge) that I am the martyr of the people. In troth, Sirs, I ſhall not hold you much longer: I will only ſay this to you, that I could have deſired a little time longer, becauſe I would have a little better digeſted this I have ſaid, and therefore I hope you will excuſe me; I have delivered my conſcience, I pray God you take thoſe courſes that are the beſt for the good of the kingdom and your own ſalvation.

Biſhop. Though your majeſty's affections may be very well known as to religion: yet it may be expected that you ſhould ſay ſomething thereof for the world's ſatisfaction.

King. I thank you heartily, my lord, for that I had almoſt forgotten it. In troth, Sir, my conſcience in religion I think, is very well known to all the world; and therefore I declare before you all, that I die a chriſtian, according to the profeſſion of the church of *England*, as I found it left me by my father; and this honeſt man I think will witneſs it.

Then turning to the officers, he ſaid, Sirs, excuſe me for this ſame: I have a good cauſe, and I have a gracious God, I will ſay no more.

Then to Colonel *Hacker* he ſaid, Take care that they do not put me to pain: and, Sir, this and it pleaſe you.——

But a gentleman coming near the ax, the king ſaid, Take heed of the Ax, pray take heed of the ax.

Then ſpeaking unto the executioner, he ſaid, I ſhall ſay but very ſhort prayers, and when I thruſt out my hands—

Then

Then he called to the biſhop for his night-cap, and having put it on, he ſaid to the executioner, Does my hair trouble you? who deſired him, to put it all under his cap, which the king did accordingly, by the help of the executioner and the biſhop. Then turning to Dr. *Juxon*, he ſaid, I have a good cauſe and a gracious God on my ſide.

Biſhop. There is but one ſtage more; this ſtage is turbulent and troubleſome, it is a ſhort one; but you may conſider it will ſoon carry you a very great way, it will carry you from earth to heaven; and there you will find a great deal of cordial joy and comfort.

King. I go from a corruptible to an incorruptible crown, where no diſturbance can be, no diſturbance in the world.

Biſhop. You are exchanged from a temporary to an eternal crown, a good exchange.

Then the king ſaid to the executioner, Is my hair well? and took off his cloke and his george, giving his george to the biſhop, ſaying, Remember. Then he put off his doublet, and being in his waiſtcoat, he put on his cloke again; then looking upon the block, he ſaid to the executioner, You muſt ſet it faſt.

Executioner. It is faſt, Sir.

King. When I put out my hands this way (ſtretching them out) then———After that, having ſaid two or three words to himſelf, as he ſtood with his hands and eyes lift up, immediately ſtooping down, he laid his neck upon the block.[a] And the executioner again putting his hair under his cap, the king thinking he had been going to ſtrike, ſaid, Stay for the ſign.

Executioner. Yes, I will, an't pleaſe your majeſty. After a little pauſe, the king ſtretching forth his hands, the executioner, at one blow, ſevered his head from his body, and held it up and ſhewed it to the people, ſaying, Behold the head of a traitor. At the inſtant when the blow was given, there was a diſmal univerſal groan among the people; and as ſoon as the execution was over, one troop of horſe marched immediately from *Charing-Croſs* to *King-ſtreet*, and another from *King-ſtreet* to *Charing-Croſs*, on purpoſe to diſperſe and ſcatter the people. The corpſe was put into a coffin, and the biſhop and Mr. *Herbert* went with it to the back-ſtairs to have it embalmed; after embalming, his head was ſewed

[a] The powers which then ruled, apprehending that the king would not ſubmit his head to the block, had prepared hooks and ſtaples to bring him down to it by violence; but he patiently ſubmitting, they had no need of them.

ed on, and the corpſe was wrapt in lead, and the coffin covered with a velvet pall, and then removed to St. *James's*. Mr. *Herbert* then made application to ſuch as were in power, that it might be interred in *Henry* VII.'s chapel; but it was denied, for that his burying there would attract infinite numbers of all ſorts thither; which as the times then were, was judged unſafe and inconvenient. Mr. *Herbert* acquainting the biſhop with this, they then reſolved to bury the king's body in the royal chapel of *St. George*, within the caſtle of *Windſor*, both in regard that his majeſty was ſovereign of the moſt noble order of the garter, and that ſeveral kings had been there interred; namely, *Henry* VI. *Edward* IV. and *Henry* VIII.; upon which conſideration, the committee of parliament was addreſſed to the ſecond time, who, after ſome deliberation, gave orders, bearing date *February* 6, 1648, authorizing Mr. *Herbert* and Mr. *Anthony Mildmay* to bury the king's body there. Accordingly the corpſe was carried thither from *St. James's*, *February* 7, in a hearſe covered with black velvet, drawn by ſix horſes covered with black cloth, and attended by about a dozen gentlemen.

The king's ſtatue was afterwards taken down from the *Royal Exchange* in *London*, where it was ſet up again by the city in the year 1682, in time of Car II.

Obſervations on the Trial of Charles I.

ON the events of theſe unhappy times, the following paſſages are collected from that celebrated hiſtorian *Hume*, who living diſtant from that period, as well as from the preſent, his obſervations may be deemed leſs liable to the imputation of party ſpirit.

1649. "It is impoſſible to deſcribe the grief, indignation, and aſtoniſhment, which tookplace, not only among the ſpectators, who were overwhelmed with a flood of ſorrow, but throughout the whole nation, as ſoon as the report of this fatal execution was conveyed to them. Never monarch, in the full triumph of ſucceſs and victory, was more dear to the people, than his misfortunes and magnanimity, his patience and piety, had rendered this unhappy prince. In proportion to their former deluſions, which had animated them againſt him, was the violence of their return to duty and affection; while each reproached himſelf, either with active diſloyalty towards him, or with too indolent defence of his oppreſſed cauſe. On weaker minds, the effect of theſe complicated paſſions was prodigious. Women

are

are ſaid to have caſt forth the untimely fruit of their womb: others fell into convulſions, or ſunk into ſuch a melancholy as attended them to their grave: nay ſome, unmindful of themſelves, as though they could not, or would not ſurvive their loved prince, it is reported, ſuddenly fell down dead. The very pulpits were bedewed with unſuborned tears; thoſe pulpits, which had formerly thundered out the moſt violent imprecations and anathemas againſt him. And all men united in their deteſtation of thoſe hypocritical parricides, who, by ſanctified pretences, had ſo long diſguiſed their treaſons, and in this laſt act of iniquity, had thrown an indelible ſtain upon the nation.

A freſh inſtance of hypocriſy was diſplayed the very day of the king's death. The generous Fairfax, not content with being abſent from the trial, had uſed all the intereſt which he yet retained, to prevent the execution of the fatal ſentence; and had even employed perſuaſion with his own regiment, though none elſe ſhould follow him, to reſcue the king from his diſloyal murderers. *Cromwel* and *Ireton*, informed of this intention, endeavoured to convince him, that the Lord had rejected the king; and they exhorted him to ſeek by prayer ſome direction from heaven on this important occaſion: but they concealed from him that they had already ſigned the warrant for the execution. *Harriſon* was the perſon appointed to join in prayer with the unwary general. By agreement, he prolonged his doleful cant, till intelligence arrived that the fatal blow was ſtruck. He then roſe from his knees, and inſiſted with *Fairfax*, that this event was a miraculous and providential anſwer, which heaven had ſent to their devout ſupplications.[a]

It being remarked, that the king, the moment before he ſtretched out his neck to the executioner, had ſaid to *Juxon*, with a very earneſt accent, the ſingle word, Remember; great myſteries were ſuppoſed to be concealed under that expreſſion; and the generals vehemently inſiſted with the prelate, that he ſhould inform them of the king's meaning. *Juxon* told them, that the king, having frequently charged him to inculcate on his ſon the forgiveneſs of his murderers, had taken this opportunity, in the laſt moment of his life, when his commands, he ſuppoſed, would be regarded as ſacred and inviolable, to re-iterate that deſire; and that his mild ſpirit thus terminated its preſent courſe, by an act of benevolence towards his greateſt enemies.

The character of this prince, as that of moſt men, if not of all men, was mixed; but his virtues predominated extremely

[a] *Herbert*, p. 135.

tremely above his vices, or, more properly ſpeaking, his imperfections: for ſcarce any of his faults roſe to that pitch as to merit the appellation of vices. To conſider him in the moſt favourable light, it may be affirmed, that his dignity was free from pride, his humanity from weakneſs, his bravery from raſhneſs. his temperance from auſterity, his frugality from avarice: all theſe virtues, in him, maintained their proper bounds, and merited unreſerved praiſe. To ſpeak the moſt harſhly of him, we may affirm, that many of his good qualities were attended with ſome latent frailty which, though ſeemingly inconſiderable, was able, when ſeconded by the extreme malevolence of his fortune, to diſappoint them of all their influence: his beneficent diſpoſition was clouded by a manner not very gracious; his virtue was tinctured with ſuperſtition; his good ſenſe was diſfigured by a deference to perſons of a capacity inferior to his own; and his moderate temper exempted him not from haſty and precipitate reſolutions. He deſerves the epithet of a good, rather than of a great man; and was more fitted to rule in a regular eſtabliſhed government, than either to give way to the encroachments of a popular aſſembly, or finally to ſubdue their pretenſions. He wanted ſuppleneſs and dexterity ſufficient for the firſt meaſure: he was not endowed with the vigour requiſite for the ſecond. Had he been born an abſolute prince, his humanity and good ſenſe had rendered his reign happy and his memory precious: had the limitations on prerogative been, in his time, quite fixed and certain, his integrity had made him regard, as ſacred, the boundaries of the conſtitution. Unhappily, his fate threw him into a period, when the precedents of many former reigns ſavoured ſtrongly of arbitrary power, and the genius of the people ran violently towards liberty. And if his political prudence was not ſufficient to extricate him from ſo perilous a ſituation, he may be excuſed; ſince even after the event, when it is commonly eaſy to correct all errors, one is at a loſs to determine what conduct, in his circumſtances, could have maintained the authority of the crown, and preſerved the peace of the nation. Expoſed, without revenue, without arms, to the aſſault of furious, implacable, and bigoted factions, it was never permitted him, but with the moſt fatal conſequences, to commit the ſmalleſt miſtake; a condition too rigorous to be impoſed on the greateſt human capacity.

Some hiſtorians have raſhly queſtioned the good faith of this prince: but, for this reproach, the moſt malignant ſcrutiny of his conduct, which, in every circumſtance, is

now thoroughly known, affords not any reasonable foundation. On the contrary, if we consider the extreme difficulties, to which he was so frequently reduced, and compare the sincerity of his professions and declarations; we shall avow, that probity and honour ought justly to be numbered among his most shining qualities. In every treaty, those concessions which he thought he could not in conscience maintain, he never could, by any motive or persuasion, be induced to make. And though some violations of the petition of right may perhaps be imputed to him; these are more to be ascribed to the necessity of his situation, and to the lofty ideas of royal prerogative, which, from former established precedents, he had imbibed, than to any failure in the integrity of his principles.

This prince was of a comely presence, of a sweet, but melancholy aspect. His face was regular, handsome, and well complexioned; his body strong, healthy, and justly proportioned; and being of a middle stature, he was capable of enduring the greatest fatigues. He excelled in horsemanship and other exercises; and he possessed all the exterior, as well as many of the essential qualities, which form an accomplished prince.

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The tragical death of *Charles* begat a question, whether the people, in any case, were entitled to judge and to punish their sovereign; and most men, regarding chiefly the atrocious usurpation of the pretended judges, and the merit of the virtuous prince who suffered, were inclined to condemn the republican principle, as highly seditious and extravagant; but there still were a few, who, abstracting from the particular circumstances of this case, were able to consider the question in general, and were inclined to moderate not contradict, the prevailing sentiment. Such might have been their reasoning. If ever on any occasion, it were laudable to conceal truth from the populace; it must be confessed, that the doctrine of resistance affords such an example; and that all speculative reasoners ought to observe, with regard to this principle, the same cautious silence, which the laws, in every species of government, have ever prescribed to themselves. Government is instituted in order to restrain the fury and injustice of the people; and being always founded on opinion, not on force, it is dangerous to weaken, by these speculations, the reverence which the multitude owe to authority, and to instruct them beforehand, that the case can ever happen, when they may be freed from their duty of allegiance. Or should it be found impossible to restrain the licence of human disquisitions, it must be ac-

knowledged, that the doctrine of obedience ought alone to be *inculcated*, and that the exceptions, which are rare, ought ſeldom or never to be mentioned in popular reaſonings and diſcourſes. Nor is there any danger, that mankind, by this prudent reſerve, ſhould univerſally degenerate into a ſtate of abject ſervitude. When the exception really occurs, even though it be not previouſly expected and deſcanted on, it muſt, from its very nature, be ſo obvious and undiſputed, as to remove all doubt, and overpower the reſtraint, however great, impoſed by teaching the general doctrine of obedience. But between reſiſting a prince and dethroning him, there is a wide interval; and the abuſes of power, which can warrant the latter violence, are greater and more enormous, than thoſe which will juſtify the former. Hiſtory, however, ſupplies us with examples even of this kind; and the reality of the ſuppoſition, though, for the future, it ought ever to be looked for, muſt, by all candid enquirers, be acknowledged in the paſt. But between dethroning a prince and puniſhing him, there is another very wide interval; and it were not ſtrange, if even men of the moſt enlarged thought ſhould queſtion, whether human nature could ever, in any monarch, reach that height of depravity, as to warrant, in revolted ſubjects, this laſt act of extraordinary juriſdiction. That illuſion, if it be an illuſion, which teaches us to pay a ſacred regard to the perſons of princes, is ſo ſalutary, that to diſſipate it by the formal trial and puniſhment of a ſovereign, will have more pernicious effects upon the people, than the example of juſtice can be ſuppoſed to have a beneficial influence upon princes, by checking their career of tyranny. It is dangerous alſo, by theſe examples, to reduce princes to deſpair, or bring matters to ſuch extremities againſt perſons endowed with great power, as to leave them no reſource, but in the moſt violent and moſt ſanguinary counſels. This general poſition being eſtabliſhed, it muſt, however, be obſerved, that no reader, almoſt of any party or prineiple, was ever ſhocked, when he read, in ancient hiſtory, that the *Roman* ſenate voted *Nero*, their abſolute ſovereign, to be a public enemy, and, even without trial, condemned him to the ſevereſt and moſt ignominious puniſhment; a puniſhment, from which the meaneſt *Roman* citizen, was by the laws, exempted. The crimes of that bloody tyrant are ſo enormous, that they break through all rules; and extort a confeſſion, that ſuch a dethroned prince is no longer ſuperior to his people, and can no longer plead, in his own defence, laws, which were eſtabliſhed for conducting the ordinary

courſe of adminiſtration. But when we paſs from the caſe of *Nero* to that of *Charles*, the great diſproportion, or rather total contrariety, of character, immediately ſtrikes us: and we ſtand aſtoniſhed, that among a civilized people, ſo much virtue could ever meet with ſo fatal a cataſtrophe. Hiſtory, the great miſtreſs of wiſdom, furniſhes examples of all kinds; and every prudential, as well as moral precept, may be authorized by thoſe events, which her enlarged mirror is able to preſent to us. From the memorable revolutions, which paſſed in *England* during this period, we may naturally deduce the ſame uſeful leſſon, which *Charles* himſelf, in his later years, inferred; that it is dangerous for princes, even from the appearance of neceſſity, to aſſume more authority, than the laws have allowed them. But, it muſt be confeſſed, that theſe events furniſh us with another inſtruction, no leſs natural, and no leſs uſeful, concerning the madneſs of the people, the furies of fanaticiſm, and the danger of mercenary armies. [a]

The confuſions, which overſpread *England* after the murder of *Charles* I. proceeded as well from the ſpirit of refinement and innovation, which agitated the ruling party, as from the diſſolution of all that authority, both civil and eccleſiaſtical, by which the nation had ever been accuſtomed to be governed. Every man had framed the model of a republic; and, however new it was, or fantaſtical, he was eager in recommending it to his fellow-citizens, or even impoſing it by force upon them. [b]

From all quarters, the parliament was now [c] harraſſed with petitions of a very free nature, which ſtrongly ſpoke the ſenſe of the nation, and proved how ardently all men longed for the reſtoration of their laws and liberties. Even in a feaſt, which the city gave to the parliament and council of ſtate, it was deemed a requiſite precaution, if we may credit *Walker* and *Dugdale*, to ſwear all the cooks, that they would ſerve nothing but wholeſome food to them.

The parliament judged it neceſſary to enlarge the laws of high treaſon beyond thoſe narrow bounds, within which they had been confined during the monarchy. They even comprehended verbal offences, nay intentions, though they had never appeared in any overt-act againſt the ſtate. To affirm the preſent government to be an uſurpation, to aſſert that the parliament or council of ſtate were tyrannical or illegal, to endeavour ſubverting their authority or ſtirring up ſedition againſt them; theſe offences were declared

[a] *Hume*, 7 vol. 144. [b] *Hume*, 7 vol. 155. [c] *May* 1648.

to be high treaſon. The power of impriſonment, of which the petition of right had bereaved the king, it was now found neceſſary to reſtore to the council of ſtate; and all the jails in *England* were filled with men whom the jealouſies and fears of the ruling party had repreſented as dangerous. The taxes, continued by the new government, and which, being unuſual, were eſteemed heavy, increaſed the general ill will, under which it laboured. Beſides the cuſtoms and exciſe, ninety thouſand pounds a month were levied on land for the ſubſiſtence of the army. The ſequeſtrations and compoſitions of the royaliſts, the ſale of the crown lands, and of the dean and chapter lands, though they yielded great ſums, were not ſufficient to ſupport the vaſt expences, and, as was ſuſpected, the great depredations, of the parliament and of their creatures. [a]

The RESTORATION.

Eleven years after, when the parliament met, they choſe Sir *Harbottle Grimſtone* ſpeaker. The great dangers in-
1660 curred during former uſurpations, joined to the extreme caution of the general [b], kept every one in awe; and none dared for ſome days, to make any mention of the king. [c] The members exerted their ſpirit chiefly in bitter invectives againſt the memory of *Cromwel*, and in execrations againſt the inhuman murderer of their late ſovereign. At laſt, the general, having ſufficiently ſounded their inclinations, gave directions to *Anneſley*, preſident of the council, to inform them, that one Sir *John Granville*, a ſervant of the king's, had been ſent over by his majeſty, and was now at the door with a letter to the Commons. The loudeſt acclamations were excited by this intelligence. *Granville* was called in: the letter accompanied with a declaration, greedily read: without one moment's delay, and without a contradictory vote, a committee was appointed to prepare an anſwer: and in order to ſpread the ſame ſatisfaction throughout the kingdom, it was voted that the letter and declaration ſhould immediately be publiſhed.

The people, freed from the ſtate of ſuſpence, in which they had ſo long been held, now changed their anxious hope for the unmixt effuſions of joy; and diſplayed a ſocial triumph and exultation, which no private proſperity, even the greateſt, is ever able fully to inſpire. Traditions remain of men, particularly of *Oughtred*, the mathematician, who died of pleaſure, when informed of this happy and ſurpriſing event. The king's declaration was well calculated to uphold the

[a] *Hume*. 7 v. 167. [b] *Monk*. [c] Eldeſt ſon of *Charles* I.

the ſatisfaction, inſpired by the proſpect of public ſettlement. It offered a general amneſty to all perſons whatſoever; and that without any exceptions but ſuch as ſhould afterwards be made by parliament: it promiſed liberty of conſcience; and a concurrence in any act of parliament, which, upon mature deliberation, ſhould be offered, for inſuring that indulgence: it ſubmitted to the arbitration of the ſame aſſembly, the inquiry into all grants, purchaſes, and alienations: and it aſſured the ſoldiers of all their arrears, and promiſed them, for the future, the ſame pay, which they then enjoyed.

The lords, perceiving the ſpirit, by which the kingdom, as well as the commons, was animated, haſtened to re-inſtate themſelves in their ancient authority, and to take their ſhare in the ſettlement of the nation. They found the doors of their houſe open; and all were admitted; even ſuch as had formerly been excluded on account of their pretended delinquency.

The two houſes attended; while the king was proclaimed with great ſolemnity, in *Palace-Yard*, at *Whitehall*, and at *Temple-Bar*.[a] The Commons voted 500 pounds to buy a jewel for *Granville*, who had brought them the king's gracious meſſages: a preſent of 50,000 pounds was conferred on the king, 10,000 pounds on the duke of *York*, 5000 pounds on the duke of *Gloceſter*. A committee of lords and commons was diſpatched to invite his majeſty to return and take poſſeſſion of the government. The rapidity, with which all theſe events were conducted, was marvellous, and diſcovered the paſſionate zeal and entire unanimity of the nation. Such an impatience appeared, and ſuch an emulation, in lords, and commons, and city, who ſhould make the moſt lively expreſſions of their joy and duty; that, as the noble hiſtorian expreſſes it, a man could not but wonder where thoſe people dwelt, who had done all the miſchief, and kept the king ſo many years from enjoying the comfort and ſupport of ſuch excellent ſubjects. The king himſelf ſaid, that it muſt ſurely have been his own fault, that he had not ſooner taken poſſeſſion of the throne; ſince he found every body ſo zealous in promoting his happy reſtoration.

The reſpect of foreign powers ſoon followed the ſubmiſſion of the king's ſubjects. *Spain* invited him to return to the *Low Countries*, and embark in ſome of her maritime towns. *France* made proteſtations of affection and regard, and offered *Calais* for the ſame purpoſe. The ſtates-general ſent deputies with a like friendly invitation. The king reſolved to accept of this laſt offer. The people of the republic

[a] *May* 8.

public bore him a cordial affection; and politics no longer reſtrained their magiſtrates from promoting and expreſſing that ſentiment. As he paſſed from *Breda* to the *Hague*, he was attended by numerous crowds, and was received with the loudeſt acclamations; as if themſelves, not their rivals in power and commerce, were now reſtored to peace and ſecurity. The ſtates-general in a body, and afterwards the ſtates of *Holland* apart, performed their compliments with the greateſt ſolemnity: every perſon of diſtinction was ambitious of being introduced to his majeſty; all ambaſſadors and public miniſters of kings, princes, or ſtates, repaired to him, and profeſſed the joy of their maſters in his behalf: ſo that one would have thought, that from the united efforts of Chriſtendom, had been derived this revolution, which diffuſed every where ſuch univerſal ſatisfaction.

The king entered *London* on the 29th of *May*, which was alſo his birth-day. The fond imaginations of men interpreted as a happy omen the concurrence of two ſuch joyful periods. [b]

The chief taxes in *England*, during the time of the commonwealth, were the monthly aſſeſſments, the exciſe, and the cuſtoms; which, during that period, much exceeded the revenue of any former king." [c]

IN contemplating the affecting circumſtances of this period of Engliſh hiſtory, no real friend to his country can avoid exclaiming, May the memory of them be deeply rooted in the hearts of Engliſhmen! Let them remember that *Charles* the I. a pious, virtuous, and accompliſhed prince, whoſe errors proceeded not from vice, from a deſpotic diſpoſition, or from want of affection to the people, but from the example of his predeceſſors, and from the common imperfections of our nature, which judging of others as we would judge of ourſelves, we muſt acknowledge did not demand an atonement, which affords ſo dreadful an inſtance of popular tyranny: let them remember that a temporary madneſs for innovation ſunk them under the deſpotiſm of *Oliver Cromwel*: a man who (in the words of *Hume*) "conſumed in gaming, drinking, debauchery and country riots the early years of his youth, and diſſipating his patrimony, until the ſpirit of reformation ſeized him:" let them remember the miſeries which overwhelmed their unhappy country,

[b] *Hume*, 7 v. 327. [c] *Hume*, 7 v. 338.

country; that the burthens of the people inſtead of being diminiſhed as was vainly expected from the impreſſions made by the artifices of ambition, had increaſed, and that they afterwards with tranſport received as their king, the ſon of their murdered monarch, as the only means of exchanging diſtreſs, diſtraction, and confuſion, for the enjoyments of peace, ſafety, and the fruits of their induſtry: let them when contending for the rights of man, remember the nature of man alſo, in which the ſpirit of competition is never at reſt, the thirſt of dominion never aſſuaged: let them not be blind to the ambition of thoſe who flatter and ſay "We are the ſupporters of the rights of the people," only that they may obtain footing on their ſhoulders, and be lifted into power, from whence they will ſpurn at the ladder by which they aſcended; let them not forget that, unaccuſtomed to eminence, ſuch men's heads will turn giddy and their ſway conſequently become capricious and tyrannical: let them remember with ſympathy, that diſquietude, the common lot of man, lurks with leſs poignancy perhaps under the garb of humility, than under the exterior magnificence of a prince; a magnificence which muſt neceſſarily be eſtimated by every rational being in its true light; not as an emblem of natural inequality between men, but as a ſplendid and honourable token of the grandeur, opulence, and diſtinguiſhed importance of the people, and an eſſential part even in the eyes of a philoſopher, of ſocial ſubordination; ſubordination *that* only ſource of the dignity, and ſupport of the rights of man: let them not plant thorns into hearts that are aking for bleſſings diſtributed by providence among other ranks of ſociety; the calm, the ſweet, the unreſtrained enjoyments of ſtill unagitated domeſtic life: let them remember that the king who reigns over free men is the father of his country, and that in him are concentrated into a ſtrong point the millions of otherwiſe weak and ſcattered rays which conſtitute the majeſty of the people; that an inſult to him is therefore an inſult to themſelves, and that the man who dares to throw an indignity on *him*, whom the people have placed at their head, as their leader, their ornament, and ſafeguard, the aſſerter of their dignity and honour, him by whoſe regulated voice the will of the whole is proclaimed to nations, deſerves the vengeance of inſulted laws, and the inſtant reprobation of every ſpirited citizen.

TREASONABLE

TREASONABLE AND SEDITIOUS LIBELS AND SPEECHES.[a]

THE ſubject on which we are now about to enter is of the utmoſt importance in every well regulated ſtate; and the late act of parliament[b] giving to juries the right of deciding whether or not a publication be in point of law a libel, has rendered the knowledge of it a matter of general concern. *That* deliberative wiſdom which has heretofore been exerciſed by the judges, in determining how far a writing tends to the injury of public tranquillity is now the province of a jury: the neceſſary qualification for ſuch a deciſion is therefore a ſubject of ſerious conſideration to every man, liable to be called upon to diſcharge the duty.

There cannot poſſibly exiſt a ſubject of judicial diſcuſſion in which there is ſo little proſpect of fair and unbiaſſed deciſion, as in this of libels affecting the public welfare: nearly connected with hiſtory and government, every important proſecution awakens the attention and the contending opinions of the kingdom, and that natural averſion in man to reſtraints of every kind, however conducive to general happineſs, draws him involuntarily to eſpouſe all attempts to leſſen their number, or to diminiſh the reſpect for thoſe who in the ſcale of ſubordination ſtand above himſelf.

This when it proceeds from a pure affection for liberty deſerves

[a] Libels, as contradiſtinguiſhed, from obnoxious ſpeeches, ſignify any writings, pictures or ſigns tending to diſturb the public peace, to injure the reputation of an individual, or to expoſe him to public hatred, contempt and ridicule. Writing, in the eye of the law, is held more criminal than mere words, though of the ſame import, from the deliberation which it argues: this with reſpect to treaſonable expreſſions will be noticed preſently: with reſpect to thoſe of a private nature it is obſervable, that to call a man rogue, raſcal, or ſcoundrel, is not actionable, and no damages can be recovered for ſuch ſpeeches: but if they be written, they then become a libel, and an action may be maintained: thus for inſtance in an action brought by *Thomas Walker* of *Mancheſter*, againſt a gentleman of the bar, who poſted him as a ſcoundrel, a coward, &c. which was tried at *Lancaſter* in March 1791, there was no objection whatever made on the ground that an action would not lie for ſuch words when written. *Thomas Walker* laid his damages at 4000l. and recovered 100l.

[b] See page 19.

deſerves no reproach, but when it proceeds, as it too often does, from envy of other people's proſperity, a hatred of diſtinctions, diſcontent in their ſituations, and a malicious deſire to pull down, without abilities, or benevolence to rear, it is a ſpirit that ſhould be ſtigmatized with univerſal abhorrence.

The giddy and enthuſiaſtic zeal which the cry of liberty kindles through all ranks of ſociety, ſhould not be excited too often, leſt when real neceſſity for it exiſts, it ſhould have loſt it's ſpring; but whatever may be it's general prevalence, whatever paſſions or party purpoſes actuate individuals; when twelve men are called upon as a jury to deliberate on the conduct of ſuch as are charged with diſturbing the public peace, they are to diveſt themſelves of prejudices founded in popular enthuſiaſm, to conſider maturely the ſtate of the ſociety of which they are members, the tendency of the ſpirit of the times, to diſtinguiſh ſedition from the honeſt exertions of cultivated minds in ſpeculations on government, and to balance with care and under the correction of their oaths, what is to be gained, againſt what may be loſt.

When men come with this diſpoſition to diſcharge their duty to their country as jurymen, with a ſufficient knowledge of the ſubject, and with a ſtrength of mind capable of reſiſting the ſeductive powers of popular harangues, which have ſuch ſway over weak underſtandings, we ſhall eſcape the only evils that were to be dreaded from that act of the legiſlature which gave to juries the power of deciding generally on queſtions of libels. If on the contrary it ſhould ever happen that the genuine liberty of the preſs ſhould be injured by a propagation of deluſive doctrines, deſtructive to the good order of ſociety; and ſhould our juries, at ſuch a period, be ſo far infected with the mad contagion as to ſuffer libellers to break down with impunity the important boundaries between the liberty and the licentiouſneſs of the preſs; it is then that this very popular act of 32 *Geo.* II. c. 60. will be either fatal to public happineſs, or it will give the death wound to the liberty of the preſs by exciting throughout the nation an abhorrence of its licentiouſneſs.

Theſe conſiderations ſhew the neceſſity of circulating a knowledge of the ſubject of treaſonable and ſeditious libels, and the principles on which the judges have proceeded in their deciſions, as lights to guide thoſe who may be called on to act as jurors, and who in that capacity are now impowered by the above act of parliament to decide on queſtions

queſtions between ſociety and thoſe individuals who attempt by any ſpecies of publications to diſturb it's tranquillity.

Publications affecting the welfare of ſociety are called libels, and of theſe there are ſeveral ſpecies, at preſent only two demand our notice, viz. treaſonable and ſeditious libels, the former expoſing the offender to the moſt awful ſentence that can be inflicted by a human tribunal; the latter expoſing him to fine, impriſonment, or infamous corporal puniſhment. It will be requiſite to give the reader a general view of the ſubjects of *treaſon* and of *miſpriſions and contempts affecting the king and government*, under which ſeditious libels are included, previous to ſtating the proſecutions, of which the ſubſtance of a ſufficient number of the moſt intereſting will be ſelected, to diſſeminate a ſpecies of knowledge, which demands a more general attention at this than at any former period, and which therefore will be a ſufficient apology for deviating in this inſtance from the plan of varied information and amuſement.

Treaſon, *proditio*, in its very name (which is borrowed from the French) imports a betraying, treachery, or breach of faith. It therefore happens only between allies, ſaith the *Mirror*: for treaſon is indeed a general appellation, made uſe of by the law, to denote not only offences againſt the king and government, but alſo that accumulation of guilt which ariſes whenever a ſuperior repoſes a confidence in a ſubject or inferior, between whom and himſelf there ſubſiſts a natural, a civil, or even a ſpiritual relation; and the inferior ſo abuſes that confidence, ſo forgets the obligations of duty, ſubjection, and allegiance, as to deſtroy the life of any ſuch ſuperior, or lord. This is looked upon as proceeding from the ſame principle of treachery in private life, as would have urged him who harbours it to have conſpired in public againſt his liege lord and ſovereign; and therefore for a wife to kill her lord or huſband, a ſervant his lord and maſter, and an eccleſiaſtic his lord or ordinary: theſe, being breaches of the lower allegiance, of private and domeſtic faith, are denominated *petit* treaſons. But when diſloyalty ſo rears its creſt, as to attack even majeſty itſelf, it is called by way of eminent diſtinction *high* treaſon, *alta proditio*; being equivalent to the *crimen læſæ majeſtatis* of the *Romans*, as *Glanvil* denominates it alſo in our *Engliſh* law.

As this is the higheſt civil crime, which (conſidered as a member of the community) any man can poſſibly commit, it ought therefore to be the moſt preciſely aſcertained. For if the crime of high treaſon be indeterminate, this alone (ſays

(ſays the preſident *Monteſquieu*) is ſufficient to make any government degenerate into arbitrary power. And yet, by the antient common law, there was a great latitude left in the breaſt of the judges, to determine what was treaſon, or not ſo: whereby the creatures of tyrannical princes had opportunity to create abundance of conſtructive treaſons; that is, to raiſe, by forced and arbitrary conſtructions, offences into the crime and puniſhment of treaſon, which never were ſuſpected to be ſuch. Thus the *accroaching*, or attempting to exerciſe, royal power (a very uncertain charge) was in the 21 *Edw.* III. held to be treaſon in a knight of *Hertfordſhire*, who forcibly aſſaulted and detained one of the king's ſubjects till he paid him 90l: a crime, it muſt be owned, well deſerving of puniſhment; but which ſeems to be of a complexion very different from that of treaſon. Killing the king's father, or brother, or even his meſſenger, has alſo fallen under the ſame denomination. The latter of which is almoſt as tyrannical a doctrine as that of the imperial conſtitution of *Arcadius* and *Honorius*, which determines that any attempts or deſigns againſt the miniſters of the prince ſhall be treaſon. But however, to prevent the inconveniencies which began to ariſe in *England* from this multitude of conſtructive treaſons, the ſtatute 25 *Edw.* III. c. 2. A. D. 1350, was made; which defines what offences only for the future ſhould be held to be treaſon: in like manner as the *lex Julia majeſtatis* among the *Romans*, promulged by *Auguſtus Cæſar*, comprehended all the antient laws, that had before been enacted to puniſh trangreſſors againſt the ſtate. This ſtatute muſt therefore be our text and guide, in order to examine into the ſeveral ſpecies of high treaſon. And we ſhall find that it comprehends all kinds of high treaſon under ſeven diſtinct branches.

1. When a man doth compaſs or imagine the death of our lord the king, of our lady his queen, or of their eldeſt ſon and heir.

2. If a man do violate the king's companion, or the king's eldeſt daughter unmarried, or the wife of the king's eldeſt ſon and heir.

3. If a man do levy war againſt our lord the king in his realm.

4. If a man be adherent to the king's enemies in his realm, giving to them aid and comfort in the realm or elſewhere.

5. If a man counterfeit the king's great or privy ſeal.

6. If a man counterfeit the king's money, and if a man bring falſe money into the realm counterfeit to the money of *England*,

England, knowing the money to be falſe, to merchandize and make payment withal.

7. If a man ſlay the chancellor, treaſurer, or the king's juſtice of the one bench or the other, juſtices in eyre, or juſtices of aſſize, and all other juſtices aſſigned to hear and determine, being in their places doing their offices.

Theſe are the treaſons expreſsly defined and aſcertained by the 25 *Edw.* III. A D. 1350. Since which however ſeveral new treaſons have been created by particular acts of parliament. As 1. Thoſe relating to papiſts. 2. The coinage, and 3. To the proteſtant ſucceſſion. From theſe various ſpecies of treaſons the purpoſe now is to notice only thoſe which have relation to the ſubject we are on.

1. In the firſt place then it is treaſon, "when a man doth compaſs or imagine the death of our lord the king, of our lady his queen, or of their eldeſt ſon and heir." Under this deſcription it is held that a queen regnant (ſuch as queen *Elizabeth* and queen *Anne*) is within the words of the act, being inveſted with royal power and entitled to the allegiance of her ſubjects: but the huſband of ſuch a queen is not comprized within theſe words, and therefore no treaſon can be committed againſt him. The king here intended is the king in poſſeſſion; without any reſpect to his title: for it is held, that a king *de facto* and not *de jure*, or in other words an uſurper that hath got poſſeſſion of the throne, is a king within the meaning of the ſtatute; as there is a temporary allegiance due to him, for his adminiſtration of the government, and temporary protection of the public: and therefore treaſons committed againſt *Henry* VI. were puniſhed under *Edward* IV. though all the line of *Lancaſter* had been previouſly declared uſurpers by act of parliament. But the moſt rightful heir of the crown, or king *de jure* and not *de facto*, who hath never had plenary poſſeſſion of the throne, as was the caſe of the houſe of *York* during the three reigns of the line of *Lancaſter*, is not a king within this ſtatute againſt whom treaſons may be committed. And a very ſenſible writer on the crown-law carries the point of poſſeſſion ſo far, that he holds, that a king out of poſſeſſion is ſo far from having any right to our allegiance, by any other title which he may ſet up againſt the king in being, that we are bound by the duty of our allegiance to reſiſt him. A doctrine which he grounds upon the ſtatute 11 *Hen.* VII. c. 1. which is declaratory of the common law, and pronounces all ſubjects excuſed from any penalty or forfeiture, which do aſſiſt and obey a king *de facto*. But, in truth, this ſeems to be confounding all notions of right and wrong; and the

conſequence

conſequence would be, that when *Cromwel* had murdered the elder *Charles*, and uſurped the power (though not the name) of king, the people were bound in duty to hinder the ſon's reſtoration: and were the king of *Poland* or *Morocco* to invade this kingdom, and by any means to get poſſeſſion of the crown (a term, by the way, of very looſe and indiſtinct ſignification) the ſubject would be bound by his allegiance to fight for his natural prince to-day, and by the ſame duty of allegiance to fight againſt him to-morrow. The true diſtinction ſeems to be, that the ſtatute of *Henry* the ſeventh does by no means *command* any oppoſition to a king *de jure*; but *excuſes* the obedience paid to a king *de facto*. When therefore an uſurper is in poſſeſſion, the ſubject is *excuſed* and *juſtified* in obeying and giving him aſſiſtance: otherwiſe, under an uſurpation, no man could be ſafe; if the lawful prince had a right to hang him for obedience to the powers in being, as the uſurper would certainly do for diſobedience. Nay farther, as the maſs of people are imperfect judges of title, of which in all caſes poſſeſſion is *prima facie* evidence, the law compels no man to yield obedience to that prince, whoſe right is by want of poſſeſſion rendered uncertain and diſputable, till providence ſhall think fit to interpoſe in his favour, and decide the ambiguous claim: and therefore, till he is entitled to ſuch allegiance by poſſeſſion, no treaſon can be committed againſt him. Laſtly, a king who has reſigned his crown, ſuch reſignation being admitted and ratified in parliament, is according to Sir *Matthew Hale* no longer the object of treaſon. And the ſame reaſon holds, in caſe a king abdicates the government; or, by actions ſubverſive of the conſtitution, virtually renounces the authority which he claims by that very conſtitution: ſince, when the fact of abdication is once eſtabliſhed, and determined by the proper judges, the conſequence neceſſarily follows, that the throne is thereby vacant, and he is no longer king.

Let us next ſee, what is a *compaſſing* or *imagining* the death of the king, &c. Theſe are ſynonymous terms; the word *compaſs* ſignifying the purpoſe or deſign of the mind or will, and not, as in common ſpeech, the carrying ſuch deſign to effect. And therefore an accidental ſtroke, which may mortally wound the ſovereign, *per infortunium*, without any traiterous intent, is no treaſon: as was the caſe of ſir *William Tyrrel*, who, by the command of king *William Rufus*, ſhooting at a hart, the arrow glanced againſt a tree, and killed the king upon the ſpot. But, as this compaſſing or imagination is an act of the mind, it cannot poſſibly fall under any judicial cognizance, unleſs it be demonſtrated by ſome open,

or

or *overt*, act. And yet the tyrant *Dionyſius* is recorded to have executed a ſubject, barely for dreaming that he had killed him; which was held for a ſufficient proof, that he had thought thereof in his waking hours. But ſuch is not the temper of the *Engliſh* law; and therefore it is neceſſary that there appear an open or *overt* act of a more full and explicit nature, to convict the traitor upon. The ſtatute expreſsly requires, that the accuſed "be thereof upon ſufficient proof attainted of ſome open act by men of his own condition." Thus, to provide weapons or ammunition for the purpoſe of killing the king, is held to be a palpable overt act of treaſon in imagining his death. To conſpire to impriſon the king by force, and move towards it by aſſembling company, is an overt act of compaſſing the king's death; for all force, uſed to the perſon of the king, in its conſequence may tend to his death, and is a ſtrong preſumption of ſomething worſe intended than the preſent force, by ſuch as have ſo far thrown off their bounden duty to their ſovereign; it being an old obſervation, that there is generally but a ſhort interval between the priſons and the graves of princes. There is no queſtion alſo, but that taking any meaſures to render ſuch treaſonable purpoſes effectual, as aſſembling and conſulting on the means to kill the king, is a ſufficient overt act of high treaſon.

How far mere *words*, ſpoken by an individual, and not relative to any treaſonable act or deſign then in agitation, ſhall amount to treaſon, has been formerly matter of doubt. We have two inſtances in the reign of *Edward* IV. of perſons executed for treaſonable words: the one a citizen of *London*, who ſaid he would make his ſon heir of the *crown*, being the ſign of the houſe in which he lived; the other a gentleman, whoſe favourite buck the king killed in hunting, whereupon he wiſhed it, horns and all, in the king's belly. Theſe were eſteemed hard caſes: and the chief juſtice *Markham* rather choſe to leave his place than aſſent to the latter judgment. *Baker's Chron.* 229. But now it ſeems clearly to be agreed, that, by the common law and the ſtatute of *Edward* III. words ſpoken amount only to a high miſdemeanor, and no treaſon. For they may be ſpoken in heat, without any intention, or be miſtaken, perverted, or miſ-remembered by the hearers: their meaning depends always on their connexion with other words, and things: they may ſignify differently even according to the tone of voice, with which they are delivered; and ſometimes ſilence is more expreſſive than any diſcourſe. As therefore there can be nothing more

equivocal

equivocal and ambiguous than words, it would indeed be unreaſonable to make them amount to high treaſon. And accordingly in 4 *Car.* I. on a reference to all the judges, concerning ſome very attrocious words ſpoken by one *Pyne*, they certified to the king, "that though the words were as wicked as might be, yet they were no treaſon: for, unleſs it be by ſome particular ſtatute, no words will be treaſon." If the words be ſet down in writing, it argues more deliberate intention; and it has been held that writing is an overt act of treaſon; for *ſcribere eſt agere*. But even in this caſe the bare words are not the treaſon, but the deliberate act of writing them. And ſuch writing, though unpubliſhed, has in ſome arbitrary reigns convicted its author of treaſon: particularly in the caſes of one *Peacham*, a clergyman, for treaſonable paſſages in a ſermon never preached; and of *Algernon Sydney*, for ſome papers found in his cloſet[a] which, had they been plainly relative to any previous formed deſign of dethroning or murdering the king, might doubtleſs have been properly read in evidence as overt acts of that treaſon, which was ſpecially laid in the indictment. But being merely ſpeculative, without any intention (ſo far as appeared) of making any public uſe of them, the convicting the author of treaſon upon ſuch an inſufficient foundation, has been univerſally diſapproved. *Peacham* was therefore pardoned: and though *Sydney* indeed was executed, yet it was to the general diſcontent of the nation; and his attainder was afterwards reverſed by parliament. There was then no manner of doubt, but that the publication of ſuch a treaſonable writing was a ſufficient overt act of treaſon at the common law; though of late even that has been queſtioned.

2. The next ſpecies of treaſon which we ſhall notice is, "if a man do levy war againſt our lord the king in his realm." And this may be done by taking arms, not only to dethrone the king, but under pretence to reform religion, or the laws[b], or to remove evil counſellors, or other grievances whether real or pretended. For the law does not, neither can it, permit any private man, or ſet of men, to interfere forcibly in matters of ſuch high importance; eſpecially as it has eſtabliſhed a ſufficient power, for theſe purpoſes, in the high court

[a] See this trial poſt.

[b] So an attempt by intimidation and violence to force the repeal of a law, is a levying war againſt the king; and high treaſon ſo laid down by the whole court of K. B. as clear law in the *king v. lord George Gordon*, Hil. term, 21 *Geo.* III. K. B. *Doug.* 590.

court of parliament. To reſiſt the king's forces by defending a caſtle againſt them, is a levying of war: and ſo is an inſurrection with an avowed deſign to pull down *all* enclo-ſures, *all* brothels, and the like; the univerſality of the deſign making it a rebellion againſt the ſtate, an uſurpation of the powers of government, and an inſolent invaſion of the king's authority. But a tumult with a view to pull down a particular houſe, or lay open a particular incloſure, amounts at moſt to a riot; this being no general defiance of public government. So, if two ſubjects quarrel and levy war againſt each other, (in that ſpirit of private war, which prevailed all over *Europe* in the early feodal times) it is only a great riot and contempt, and no treaſon. Thus it happened between the earls of *Hereford* and *Gloceſter* in 20 *Edw.* I. who raiſed each a little army, and committed outrages upon each other's lands, burning houſes, attended with the loſs of many lives: yet this was held to be no high treaſon, but only a great miſdemeanor. A bare conſpiracy to levy war does not amount to *this* ſpecies of treaſon; but (if particularly pointed at the perſon of the king or his government) it falls within the firſt, of compaſſing or imagining the king's death.

3. "If a man be adherent to the king's enemies in his realm, giving to them aid and comfort in the realm, or elſewhere," he is alſo declared guilty of high treaſon. This muſt likewiſe be proved by ſome overt act, as by giving them intelligence, by ſending them proviſions, by ſelling them arms, by treacherouſly ſurrendering a fortreſs, or the like. By enemies are here underſtood the ſubjects of foreign powers with whom we are at open war. As to foreign pirates or robbers, who may happen to invade our coaſts, without any open hoſtilities between their nation and our own, and without any commiſſion from any prince or ſtate at enmity with the crown of *Great Britain*, the giving them any aſſiſtance is alſo clearly treaſon; either in the light of adhering to the public enemies of the king and kingdom, or elſe in that of levying war againſt his majeſty. And, moſt indiſputably, the ſame acts of adherence or aid, which (when applied to foreign enemies) will conſtitute treaſon under this branch of the ſtatute, will (when afforded to our own fellow-ſubjects in actual rebellion at home) amount to high treaſon under the deſcription of levying war againſt the king. But to relieve a rebel, fled out of the kingdom, is no treaſon: for the ſtatute is taken ſtrictly, and a rebel is not an *enemy*; an enemy being always the ſubject of ſome foreign prince, and one who owes no allegiance to the crown

crown of *England*. And if a perſon be under circumſtances of actual force and conſtraint, through a well-grounded apprehenſion of injury to his life or perſon, this fear or compulſion will excuſe his even joining with either rebels or enemies *in* the kingdom, provided he leaves them whenever he hath a ſafe opportunity.

The three preceding ſpecies of treaſon were aſcertained by the before-mentioned ſtatute 25 *Edw.* Of thoſe which have been created ſince it will be requiſite to ſtate only one, viz. that which is created for the ſecurity of the *proteſtant ſucceſſion*. For this purpoſe, after the act of ſettlement was made, for transferring the crown to the illuſtrious houſe of *Hanover*, it was enacted by 13 & 14 *Will.* III. c. 3. that the pretended prince of *Wales*, who was then thirteen years of age, and had aſſumed the title of king *James* III. ſhould be attainted of high treaſon; and it was made high treaſon for any of the king's ſubjects by letters, meſſages, or otherwiſe, to hold correſpondence with him, or any perſon employed by him, or to remit any money for his uſe, knowing the ſame to be for his ſervice. And by ſtatute 17 *Geo.* II. c. 39, it is enacted, that if any of the ſons of the Pretender ſhall land or attempt to land in this kingdom, or be found in *Great Britain*, or *Ireland*, or any of the dominions belonging to the ſame, he ſhall be judged attainted of high treaſon, and ſuffer the pains thereof. And to correſpond with them, or to remit money for their uſe, is made high treaſon in the ſame manner as it was to correſpond with the father. By the ſtatute 1 *Anne*, ſt. 2. c. 17, if any perſon ſhall endeavour to deprive or hinder any perſon, being the next in ſucceſſion to the crown according to the limitations of the act of ſettlement, from ſucceeding to the crown, and ſhall maliciouſly and directly attempt the ſame by any overt act, ſuch offence ſhall be high treaſon. And by ſtatute 6 *Anne* c. 7. if any perſon ſhall maliciouſly, adviſedly, and directly, by writing or printing, maintain and affirm, that any other perſon hath any right or title to the crown of this realm, otherwiſe than according to the act of ſettlement; or that the kings of this realm with the authority of parliament are not able to make laws and ſtatutes, to bind the crown and the deſcent thereof; ſuch perſon ſhall be guilty of high treaſon. This offence (or indeed maintaining this doctrine in any wiſe, that the king and parliament cannot limit the crown) was once before made high treaſon, by ſtatute 13 *Eliz.* c. 1. during the life of that princeſs. And after her deceaſe it continued a high miſdemeanor, puniſhable with the forfeiture of goods and chattels, even in the moſt flouriſhing æra of indefeaſible hereditary right and *jure divino* ſucceſſion. But it was again

raiſed into high treaſon, by the ſtatute of *Anne* before-mentioned, at the time of a projected invaſion in favour of the then Pretender: and upon this ſtatute one *Matthews*, a printer, was convicted and executed in 1719, for printing a treaſonable pamphlet entitled *Vox populi vox Dei*.[b]

Thus much for the crime of treaſon, or *læſæ majeſtatis*: which conſiſts, we may obſerve, originally, in groſsly counteracting that allegiance, which is due from the ſubject by either birth or reſidence. We now paſs from defining the crime to deſcribe its puniſhment.

The puniſhment of high treaſon in general is very ſolemn and terrible. 1. That the offender be drawn to the gallows, and not be carried or walk; though uſually by connivance, (at length ripened by humanity into law) a ſledge or hurdle is allowed, to preſerve the offender from the extreme torment of being dragged on the ground or pavement. 2. That he be hanged by the neck, and then cut down alive. 3. That his head be cut off. 4. That his body be divided into four parts. 5. That his head and quarters be at the king's diſpoſal.[c]

The king may, and often doth, diſcharge all the puniſhment, except beheading, eſpecially where any of noble blood are attainted. For beheading being part of the judgment, that may be executed, though all the reſt be omitted by the king's command. But where beheading is no part of the judgment, as in murder or other felonies, it hath been ſaid that the king cannot change the judgment, although at the requeſt of the party, from one ſpecies of death to another.

In the caſe of coining, which is a treaſon of a different complexion from the reſt, the puniſhment is milder for male offenders; being only to be drawn, and hanged by the neck till dead. But in treaſons of every kind the puniſhment of women is the ſame, and different from that of men. For, as the decency due to the ſex forbids the expoſing and publicly mangling their bodies, their ſentence (which is to the full as terrible to ſenſation as the other) is to be drawn to the gallows, and there to be burned alive. altered by 3 & 4 Geo IV c48 - 1750 to hanging -

WE will now proceed to the ſubject of *ſeditious libels*, which with various other ſpecies of public offences, come under the deſcription of *miſpriſions* and *contempts affecting the king and government*. Theſe therefore will likewiſe be included among the following obſervations.

Miſpriſions

[b] See this trial poſt.

[c] This puniſhment for treaſon, Sir *Edward Coke* tells us, is warranted by divers examples in Scripture; for *Joab* was drawn, *Bithan* was hanged, *Judas* was embowelled, and ſo of the reſt (3d Inſt. 211.)

Miſpriſions (a term derived from the old *French*, *meſpris*, a neglect or contempt) are, in the acceptation of our law, generally underſtood to be all ſuch high offences as are under the degree of capital, but nearly bordering thereon: and it is ſaid, that a miſpriſion is contained in every treaſon, and felony whatſoever: and that, if the king ſo pleaſe, the offender may be proceeded againſt for the miſpriſion only. And upon the ſame principle, while the juriſdiction of the ſtar-chamber[a] ſubſiſted, it was held that the king might remit a proſecution for treaſon, and cauſe the delinquent to be cenſured in that court, merely for a high miſdemeanor: as happened in the caſe of *Roger* earl of *Rutland*, in 43 *Eliz.* who was concerned in the earl of *Eſſex*'s rebellion. Miſpriſions are generally divided into two ſorts; negative, which conſiſt in the concealment of ſomething which ought to be revealed; and poſitive, which conſiſt in the commiſſion of ſomething which ought not to be done.

I. Of the firſt, or negative kind, is what is called *miſpriſion of treaſon*; conſiſting in the bare knowledge and concealment of treaſon, without any degree of aſſent thereto: for any aſſent makes the party a principal traitor; as indeed the concealment, which was conſtrued aiding and abetting, did at the common law: in like manner as the knowledge of a plot againſt the ſtate, and not revealing it, was a capital crime at *Florence*, and other ſtates of *Italy*. But it is now enacted by the ſtatute 1 & 2 *Ph.* & *Mar.* c. 10. that a bare concealment of treaſon ſhall be only held a miſpriſion. This concealment becomes criminal, if the party apprized

[a] The *ſtar-chamber* was a court of very ancient original, but new modelled by ſtatutes 3 *Hen.* VIII. c. 1. and 21 *Hen.* VIII. c. 20. conſiſting of divers lords ſpiritual and temporal, being privy counſellors, together with two judges of the courts of common law, without the intervention of any jury. Their juriſdiction extended legally over riots, perjury, miſbehaviour of ſheriffs, and other notorious miſdemeanors, contrary to the laws of the land. Yet this was afterwards (as lord *Clarendon* informs) ſtretched "to the aſſerting of all proclamations, and orders of ſtate: to the vindicating of illegal commiſſions and grants of monopolies; holding for honourable that which pleaſed, and for juſt that which profited, and becoming both a court of law to determine civil rights, and a court of revenue to enrich the treaſury; the council table by proclamations enjoining to the people that which was not enjoined by the laws, and prohibiting that which was not prohibited; and the ſtar-chamber, which conſiſted of the ſame perſons in different rooms, cenſuring the breach and diſobedience to thoſe proclamations by very great fines, impriſonments, and corporal ſeverities; ſo that any diſreſpect to any acts of ſtate, or to the perſons of ſtateſmen, was in no time more penal, and the foundations of right never more in danger to be deſtroyed." For which reaſons it was finally aboliſhed by ſtatute 16 *Car.* I. c. 10. 1641, to the general joy of the whole nation. 4 *Black.* Com. 267.

of the treaſon does not, as ſoon as conveniently may be, reveal it to ſome judge of aſſize or juſtice of the peace. But if there be any probable circumſtances of aſſent, as if one goes to a treaſonable meeting, knowing beforehand that a conſpiracy is intended againſt the king; or, being in ſuch company once by accident, and having heard ſuch treaſonable conſpiracy, meets the ſame company again, and hears more of it, but conceals it; this is an implied aſſent in law, and makes the concealer guilty of actual high treaſon.

II. Miſpriſions, which are merely poſitive, are generally denominated *contempts* or *high miſdemeanors*; of which are ſuch contempts of the executive magiſtrate, as demonſtrate themſelves by ſome arrogant and undutiful behaviour towards the king and government. Theſe are

1. Contempts againſt the king's prerogative. As, by refuſing to aſſiſt him for the good of the public: either in his councils, by advice, if called upon; or in his wars, by perſonal ſervice for defence of the realm, againſt a rebellion or invaſion. Or by diſobeying the king's lawful commands; whether by writs iſſued out of his courts of juſtice, or by a ſummons to attend his privy council, or by letters from the king to a ſubject commanding him to return from beyond the ſeas, (for diſobedience to which his lands ſhall be ſeiſed till he does return, and himſelf afterwards puniſhed) or by his writ of *ne exeat regnum*, or proclamation, commanding the ſubject to ſtay at home. Diſobedience to any of theſe commands is a high miſpriſion and contempt: and ſo, laſtly, is diſobedience to any act of parliament, where no particular penalty is aſſigned; for then it is puniſhable, like the reſt of theſe contempts, by fine and impriſonment, at the diſcretion of the king's courts of juſtice.

2. Contempts and miſpriſions againſt the king's *perſon* and *government*, may be by ſpeaking and writing againſt them, curſing or wiſhing him ill, giving out ſcandalous ſtories concerning him, or *doing any thing that may tend to leſſen him in the eſteem of his ſubjects, may weaken his government, or may raiſe jealouſies between him and his people.*[a] 1 Hawk. P. C. c. 23. ſec. 6. It has alſo been held an offence of this ſpecies to drink to the pious memory of a traitor; or for a clergyman to abſolve perſons at the gallows, who there perſiſt in the treaſons for which they die: theſe being acts which impliedly encourage rebellion. And for this ſpecies of contempt a man may not only be fined and impriſoned, but ſuffer the pillory or other infamous corporal puniſhment: in like manner as, in the antient *German* empire, ſuch perſons as endeavoured to ſow

[a] Theſe words of that great writer on Criminal Law, *Hawkins*, afford a touchſtone by which a jury may try the criminality of publications.

ſow ſedition, and diſturb the public tranquillity, were condemned to become the objects of public notoriety and deriſion, by carrying a dog upon their ſhoulders from one great town to another. The emperors *Otho* I. and *Frederick Barbaroſſa* inflicted this puniſhment on noblemen of the higheſt rank.

3. Contempts againſt the king's title, not amounting to treaſon or *præmunire*, are the denial of his right to the crown in common and unadviſed diſcourſe; for if it be by adviſedly ſpeaking, it amounts to a *præmunire*[a]. This heedleſs ſpecies of contempt is however puniſhed by our law with fine and impriſonment. 4. *Black. Com. paſſim.*

Having thus given a general view of ſuch branches of the crime of high treaſon as were properly introductory to the ſubject of treaſonable libels, and alſo a view of the offences ſtyled miſpriſions and contempts affecting the king and government, under which ſeditious libels are included: we now proceed to lay before the reader the ſubſtance of the moſt remarkable proſecutions for theſe offences, and by ranging them in chronological order, they will exhibit a comparative view of the adminiſtration of public juſtice, the eloquence of the bar, the ſpirit of the times, the liberty of the preſs, and the occaſional exertions of the law, againſt its licentiouſneſs at different periods of *Engliſh* hiſtory; for it is principally by theſe proſecutions that the energies of theſe intereſting topicks have been called forth.

It will however be proper, firſt to premiſe a few obſervations reſpecting the preſs. In all inſtances (ſays *Blackſtone*) where libels are puniſhed by the *Engliſh* law, ſome with a greater, others with a leſs degree of ſeverity; the liberty of the preſs, properly underſtood, is by no means infringed or violated. The liberty of the preſs is indeed eſſential to the nature of a free ſtate: but this conſiſts in laying no previous reſtraints upon publications, and not in freedom from cenſure for criminal matter when publiſhed. Every man has an undoubted right to lay what ſentiments he pleaſes before the public: to forbid this, is to deſtroy the freedom of the preſs: but if he publiſhes what is improper, miſchievous, or illegal, he muſt take the conſequence of his own temerity.

To

[a] So called from the words of the writ, preparatory to the execution thereof; "*præmunire facias*, A. B. &c. Cauſe A. B. to be forewarned, &c." Its puniſhment is as follows, "from the conviction the defendant ſhall be out of the king's protection, and his land and tenements, goods and chattels, forfeited to the king, and his body to remain in priſon during life; he can bring no action for any private injury, being ſo far out of the protection of the law, that it will not guard his civil rights, nor remedy any grievance which he as an individual may ſuffer, &c. and no man knowing him to be guilty can with ſafety give him comfort, aid, or relief. 4 Black. Com. 103, 118.

To ſubject the preſs to the reſtrictive power of a licenſer, as was formerly done, both before and ſince the revolution[b], is to ſubject all freedom of ſentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all the controverted points in learning, religion, and government. But to puniſh (as the law does at preſent) any dangerous, or offenſive writings, which, when publiſhed, ſhall on a fair and impartial trial be adjudged of a pernicious tendency, is neceſſary for the preſervation of peace and good order, of government and religion, the only ſolid foundation of civil liberty. Thus the will of individuals is ſtill left free; the abuſe only of that free will is the object of legal puniſhment. Neither is any reſtraint hereby laid upon the freedom of thought or inquiry: liberty of private ſentiment is ſtill left; the diſſeminating, or making public, of bad ſentiments, deſtructive of the ends of ſociety, is the crime which ſociety corrects. A man (ſays a fine writer on this ſubject) may be allowed to keep poiſons in his cloſet, but not publicly to vend them as cordials. And to this we may add, that the only plauſible argument heretofore uſed for reſtraining the juſt freedom of the preſs, "that it was neceſſary to prevent the daily abuſe of it," will entirely loſe its force, when it is ſhewn (by a ſeaſonable exertion of the laws) that the preſs cannot be abuſed to any bad purpoſe, without incurring a ſuitable puniſhment: whereas it never can be uſed to any good one, when under the controul of an inſpector. So true will it be found, that to cenſure the licentiouſneſs, is to maintain the liberty of the preſs. 4 *Black. Com.* 151.

[b] The art of printing, ſoon after its introduction, was looked upon (as well in *England* as in other countries) as merely a matter of ſtate, and ſubject to the coercion of the crown. It was therefore regulated with us by the king's proclamations, prohibitions, charters of privilege and of licence, and finally by the decrees of the court of ſtar-chamber; which limited the number of printers and of preſſes which each ſhould employ, and prohibited new publications, unleſs previouſly approved by proper licenſers. On the demolition of this odious juriſdiction in 1641, the long parliament of *Charles* I. after their rupture with that prince, aſſumed the ſame powers as the ſtar-chamber exerciſed with reſpect to the licenſing of books; and in 1643, 1647, 1649, and 1652, (Scobel i. 44, 134. ii. 88. 230.) iſſued their ordinances for that purpoſe, founded principally on the ſtar-chamber decree of 1637. In 1662 was paſſed the ſtatute 13 & 14 Car. II. c. 33. which (with ſome few alterations) was copied from the parliamentary ordinances. This act expired in 1679, but was revived by ſtatute 1 Jac. II. c. 17. and continued till 1692. It was then continued for two years longer by ſtatute 4 W. & M. c. 24. but though frequent attempts were made by the government to revive it, in the ſubſequent part of that reign, (Com. Journ. 11. *Feb.* 1694. 26. *Nov.* 1695. 22 *Oct.* 1696. 9 *Feb.* 1697. 31 *Jan.* 1698.) yet the parliament reſiſted it ſo ſtrongly, that it finally expired, and the preſs became properly free, in 1694; and has ever ſince ſo continued.

The

The TRIAL of Sir RICHARD KNIGHTLEY, Mr. HALES, Sir———WICKSTONE and his WIFE, for countenancing and maintaining SEDITIOUS LIBELS, before the Court of Star Chamber, 13th FEBRUARY 1588, 31. ELIZABETH.

MR. Attorney-general *Popham* opened the charge by obſerving that the proſperous and happy ſtate of her majeſty was not unknown unto them all that were preſent, and ſo dilated thereon, *&c.* until two enemies had choſen to diſturb this quietneſs, *viz.* the papiſts abroad, who by foreign arms, *&c.* and the ſeditious ſectaries at home, whereof there are lewd people; next the *Browniſts*, and their fellows: but juſtice had been done on theſe men, and the law executed. But there is another ſort of ſectary, that are of no ſettled ſtate, but ſeek to transform and ſubvert all. Theſe men would have——government in every ſeveral congregation, ſeverally in each province, in every dioceſe, yea, in every pariſh; whereupon would enſue more miſchief than any man by tongue can utter: they themſelves cannot agree among themſelves, but are full of envy and emulation; but what greater emulation than to fall to contention, and from contention, to proceed to violence? But they ſtay not here, nor contented with railing againſt the church and the ſtate thereof, but proceed to court and the common-weal, that all things might contribute to preſerve unity among the brethren; no law, no order left, all propriety of things taken away and confounded.

But of what ſort of people theſe ſectaries? of the very vileſt and baſeſt ſort, and theſe muſt make confuſion of all ſtate, and ſo advance themſelves in their congregations, this their courſe and this their purpoſe; ſo the heel ſhould govern the head, and not the head the heel, if theſe men be allowed. Her majeſty, in her great wiſdom duly conſidered the great danger of theſe inconveniencies, took order that no pamphlets or treatiſes ſhould be put in print, but ſuch as ſhould be firſt ſeen and allowed; and farther, leſt that were not ſufficient, ſhe ordained that no printing ſhould be uſed any where but in *London*, *Oxford* and *Cambridge*.

bridge. Notwithſtanding all this ſerved not, but they would print in corners, and ſpread abroad things imprinted; wherefore her majeſty ſet forth a proclamation in *Anno* 25. that all *Brouniſts* books, and ſuch other ſeditious books ſhould be ſuppreſſed and burnt. Afterwards, when their new ſeditious and infamous libels were ſpread abroad, her majeſty in *February* laſt ſet forth another proclamation, that all her ſubjects might take warning: but becauſe no reformation is had, ſhe now holds it neceſſary to proceed in juſtice: and therefore theſe men, now priſoners at the bar, but anſwer to their offences, and receive according to their demerits: and firſt for their faults. Sir *Richard Knightley* being a great man in his county, a deputy-lieutenant, who had the government thereof, a ſeditious and lewd rebel came unto him to have place and entertainment with him, and there Sir *Richard* received him to print: Sir *Richard* doth confeſs that *Penry* told him he would ſet forth ſuch a like book as he had before-time ſet forth for the government of *Wales*. That book contains ſedition and ſlander moſt opprobrious; and yet Sir *Richard* was contented ſuch a like book ſhould be printed.

But farther, Sir *Richard* ſent his man a ring for a token to receive the preſs into his houſe, who did ſo, and there they printed *The Epitome*, *Walgrave* himſelf being the printer; this is a moſt ſeditious and libellous pamphlet, fit for a vice in a play, and no other: but then the parſon of the pariſh having found out the printing, told Sir *Richard* that it was very dangerous; whereupon Sir *Richard* cauſed him to take it down, but neither diſliked it nor diſcovered it, but kept it ſecret, and read the books himſelf. Again, when it was told him that his houſe would be ſearched for the preſs, he ſaid he would courſe them that would come to ſearch his houſe; beſides, at his recommendation *Walgrave* was commended unto Mr. *Hales*, and there had entertainment, and there "*The Supplication to the Parliament*" was printed by *Walgrave*, and publiſhed by *Newman*, Sir *Richard*'s man: and another book, viz. "*Have you any work for the Cooper?*" was there printed likewiſe. Therein the ſectaries themſelves confeſs, that inconvenience would enſue of this government which they ſo ſought to eſtabliſh; but yet it muſt be brought in, becauſe they were ſo determined. And from Mr. *Hales*'s houſe in *Coventry*, theſe books and this preſs muſt be conveyed to Sir—— *Wickſtone*'s, where "*Martyn ſenior*," and "*Martyn junior*" were both printed: wherein theſe libellers ſay, that all laws that any way impugn this doctrine of theirs are not to be

obeyed

obeyed in any cauſe; then if this be ſuffered, confuſion and diſorder muſt needs enſue. But farther, in theſe books they affirm that the time doth offer them a great opportunity, as though all things would be ſuffered in this ſo troubleſome a time, rather than they ſhould any way be diſquieted. And for Sir ——— *Wickſtone*, albeit he knew the preſs was in his houſe, yet he kept it a ſecret, and would never diſcover it, but came many times, and did viſit there at the preſs; and his wife, by whoſe procurement and perſuaſions with her huſband, they were firſt received into his houſe, did often relieve them with meat and drink, and gave them money in their purſes. This is the ſubſtance and ſum of their offence, which if they will deny, unconteſtable and manifeſt proofs ſhall be produced againſt them. And ſo he concluded.

Hereupon Sir *Richard Knightley* began to anſwer, and moſt humbly beſought their Lordſhips to conſider of his ſimple wit, and weak capacity, not able to ſpeak in ſuch a place, and before ſo honourable an aſſembly; and ſaid, that theſe miſhaps which were now ſo aggravated againſt them, were a puniſhment impoſed by God, to put him in mind of other his grievous crimes committed againſt the majeſty of the Moſt Higheſt. He affirmed conſtantly that he was no ſectary, but of that religion, that ſelf-ſame religion, which he hoped all they which were then preſent were of, and ſo he truſted were all other her majeſty's loving ſubjects. And if he ſhould ſpeak any thing amiſs, he deſired them not to impute it to his ill diſpoſition, but to his wants, which were many, and the more, by reaſon of his late impriſonment: and ſaid, he was right glad that their honours were ordained by God, and appointed by her majeſty to be his judges, at whoſe hands he ſhould receive nothing but juſtice: wherefore he beſought them to be an interceſſor and mediator to her majeſty in his behalf, againſt whom, for any offence committed, or againſt the ſtate, to his knowledge he was as clear as any preſent, and as good a ſubject as ever came to that bar. He utterly diſclaimed the books, and denied to have any familiarity to his knowledge with thoſe that were the writers of them; and ſhewed that the preſs was brought into his houſe for this reaſon: there was a book, that before time was printed at *Oxford*, which to his knowledge was never called in; this book was written by one Mr. *Penry*, who requeſted Sir *Richard* that this book might be printed again in his houſe, and in reſpect of the want of learning, which he knew to be in the miniſtry, he did the rather incline an ear unto. For although he muſt needs

needs confeſs there were in the miniſtry ſome good, yet to his thinking, for one good, there were forty bad, yea, ſo bad, as he thought them not worthy to ſweep the church; and therefore his zeal for the furtherance of God's glory cauſed him to allow of this book. This, as he ſaid, was about *St. James*-tide twelvemonth, and he had heard nothing thereof again until *All-hallow*-tide following; and ſaid, that the preſs was never in his own houſe, but in a houſe at the farther end of the town. And he ſaid, that at *Chriſtmas* following *Walgrave* came to him and deſired the preſs, and ſaid that Mr. *Cartwright* had wrote a book againſt the jeſuits, which he hoped to print. This is the truth, ſaith he.

He wrote to Mr. *Hales* to defend a houſe for a poor man: all this was done before the proclamation, ſince which time he never meddled therein, as he ſaid; for my lord Chancellor moſt honourably gave him warning to look unto that, which he hath accompliſhed like a good ſubject to her majeſty, to whom he confeſſeth himſelf more bounden, as he thinketh all the world is beſide; and now hath learned of *David*, not ſo much as to touch the hem of the Lord's anointed. He hopeth her majeſty will likewiſe forgive him, as ſhe hath forgiven greater offences: and beſought them all to be good unto him, and he for his part would ſay with *Moſes* and *Paul*, that he would rather deſire to be wiped out of the book of life, than not perform his duty to her majeſty. And ſo he concluded.

Mr. *Hales* in his defence ſaid, That albeit it were a great grief unto him to be convented before their lordſhips, yet in this he joyed that they were his judges, that were the governors and judges of the land, which could and would do him nothing elſe but juſtice: he confeſſed the bleſſing of God to be exceeding great unto the commonwealth for placing her majeſty over the ſame, by whoſe means we enjoy that peace which other nations want, and we happy that live under her: he diſclaimed the books; but he had great reaſon as he thought to gratify Sir *Richard Knightley* in any thing, to whom he owed much reverence, as him that had married his aunt. Sir *Richard* deſired him to lend his houſe for a poor man, to the which he condeſcended; but he knew not the man, nor his intent; he met with *Penry* in *Coventry*, at a ſermon, who deſired him to direct him to his houſe, there he had *The Supplication to the Parliament* that was printed at *Oxford*; he told him he would print Mr. *Cartwright*'s book againſt the Romiſh Teſtament: he was privy that there was a preſs there, but nothing elſe.

It

It was an eaſy matter for a wiſer man than himſelf to be thus overtaken, *Penry* himſelf was not indicted nor impeached. And he hoped, if a man ignorantly did receive a traitor or jeſuit, that it was not treaſon, unleſs himſelf knew of it.

Attorney. You acknowledge you had a book of him?

Hales. I do.

Attorney. And you came to the maker of it?

Hales. It was before the proclamation.

Attorney. It was after.

Hales. It was after the firſt, and before the ſecond proclamation. [Hereupon was read the firſt proclamation, made in 27 *Eliz.* againſt ſchiſmatical and ſeditious libels, Dr. *Brown* and ſuch others.]

Hales. But Mr. *Penry's* was no libel, for he ſubſcribed his name.

Attorney. There is no doubt but it is a libel, though it be ſubſcribed: whereunto *Hales* ſaid nothing. And then was read the other proclamation in 31 *Eliz.* and the order in the ſtar-chamber, made in 28 *Eliz.* whereby printing was allowed only in *London*, *Oxford* and *Cambridge*.

Wickſtone ſaid, he was an ignorant man, and craved he might anſwer by Counſel, which might direct him: whereunto the Lord Chancellor anſwered, that this was matter of fact which lay moſt properly within his own knowledge, and that he muſt provide to anſwer for himſelf, and that he needed no counſel. [a]

Whereupon *Wickſtone* confeſſed, that his wife deſired him to permit them a home in his houſe, which he conſented unto, knowing the purpoſe of them, and that was all.

Lady

[a] It is a ſettled rule at common law that no counſel ſhall be allowed a priſoner upon his trial, upon the general iſſue, in any capital crime, unleſs ſome point of law ſhall ariſe proper to be debated. A rule, which (however it may be palliated under cover of that noble declaration of the law, when rightly underſtood, that the judge ſhall be counſel for the priſoner; that is, ſhall ſee that the proceedings againſt him are legal and ſtrictly regular) ſeems to be not at all of a piece with the reſt of the humane treatment of priſoners by the *Engliſh* law. For upon what face of reaſon can that aſſiſtance be denied to ſave the life of a man, which yet is allowed him in proſecutions for every petty treſpaſs? Nor indeed is it, ſtrictly ſpeaking, a part of our ancient law: for the *Mirrour*, having obſerved the neceſſity of counſel in civil ſuits, "who know how to forward and defend the cauſe, by the rules of law and cuſtoms of the realm," immediately afterwards ſubjoins; "and more neceſſary are they for defence upon indictments and appeals of felony, than upon other venial cauſes." And the judges themſelves are ſo ſenſible of this defect, that they never ſcruple to allow a priſoner counſel to inſtruct him what queſtions to aſk,

or

Lady *Wickſtone* confeſſed that the zeal of reformation in the church, cauſed her to give them entertainment in her houſe, and ſhe was the cauſe that they came thither, not thinking that it had been any way hurtful or dangerous to the ſtate; and ſhe humbly beſought, that what fault ſoever ſhe had committed, her huſband might not be puniſhed therefore, ſince he was not privy, but only by her means and requeſt.

Hereupon Mr. *Puckering*, the queen's ſerjeant, began to lay open the enormity of thoſe books, which they had in Court, and divers clauſes of them were read.

Particularly the following paſſages, where *Penry* ſays, "They would never give over, though the *Spaniards* were overthrown and diſcomfited by famine and hunger; yet the Lord would raiſe them up again, and make a weak and feeble generation to overthrow us."

In another paſſage it is ſaid, that "No truth is to be found in our parliaments, or councils:" that "If the government of the ſectaries was not received, thoſe of the parliament-houſe, or their ſeed, ſhould never proſper, or bear rule in *England*. And I (*Penry*) will never leave, till either this be performed; or that the Lord, in vengeance and blood, do plague and puniſh us."

In the book, entitled, *Have you any Work for the Cooper*, it is affirmed, that "Our church government is utterly unlawful; and although this form of theirs might be inconvenient, in many points, yet every chriſtian was bound to receive their paſtors, doctors, elders, and deacons."

In *Martin Junior*, it is declared, "to be unlawful to have any other government, but theirs: that all human laws, maintaining

or even to aſk queſtions for him, with reſpect to matters of fact: for as to matters of law, ariſing on the trial, they are *entitled* to the aſſiſtance of counſel. But, leſt this indulgence ſhould be intercepted by ſuperior influence, in the caſe of ſtate-criminals, the legiſlature has directed by ſtatute 7 *W.* III. c. 3. that perſons *indicted* for ſuch high treaſon, as works a corruption of the blood, or miſpriſion thereof, (except treaſon in counterfeiting the king's coin or ſeals) may make their full defence by counſel, not exceeding two, to be named by the priſoner and aſſigned by the court or judge: and the ſame indulgence, by ſtatute 20 *Geo.* II. c. 30. is extended to parliamentary *impeachments* for high treaſon, which were excepted in the former act, 4 *Black.* Com. 355. In the trial of *Swenſden* for *forcible marriage*, he ſays, page 35, "I pleaded for longer time to prepare for my trial, but was allowed but four days: when I was brought to my trial, I moved for a counſel to plead my cauſe, as being a ſtranger, and not acquainted with the laws of *England*." When in ſuch a caſe counſel was refuſed: can it be requiſite to ſay more to induce the legiſlature to correct by an act of parliament this cruelty of the common law?

maintaining any other forms, were ungodly, and not to be obeyed: that the warrant that biſhops have to maintain their authority, is no better than that which did maintain the ſtews: that antichriſt was the head of their doctrine, and they part of his body."

In *Martin Senior*, They ſpeak reproachfully of the common prayer: declare that a hundred thouſand hands would ſign to their poſitions, and the government they ſeek: that they are the ſtrength of the land; and that it were no policy to reject their ſuit at ſuch a time, when the land was invaded.

He then affirmed that they tended to the ruin of the whole ſtate, next to the aboliſhing of all eccleſiaſtical government, to the removing of all manner of ſervice, the overthrow of laws; and yet, ſay they, all laws which reſiſt theſe men, are no more to be allowed than thoſe which maintain ſtews. But *Penry* will never give that over, he ſays, though the *Spaniards* were overthrown and diſcomfited by famine and by hunger, yet the Lord will raiſe them up again, and make a weak and feeble generation to overthrow us.

The lords having taken the matter into conſideration they agreed that the books were moſt lewd, dangerous and ſeditious, and pernicious to the ſtate, moſt ſcandalous in reſpect to our adverſaries the papiſts, who took occaſion of our diſagreement; that they were ſlanderous to her majeſty, in accuſing her for not maintaining religion. Whereas ſhe for defence of religion only hath ſcared all the enemies of the ſtate: that the ſword of war had been drawn out againſt her for that cauſe; nay, the ſword of death had compaſſed her chair in her own chamber: [Mr. *Parrie* and Mr. *Barnwell.*] Notwithſtanding ſhe, nothing diſmayed, being of princely magnanimity and fortitude, hath not feared any of theſe dangers only for religion ſake. That they took away her majeſty's regal power, diſinherited noblemen and gentlemen, took away all property, aboliſhed the reverend eſtate and calling of biſhops, which are one of the three ancient eſtates of this land; and ſo they meant to pick out one ſtone after another, till they had pulled the whole houſe on their heads. That the faults of them there preſent were groſs and grievous; Sir *Richard*, a man highly favoured of the queen, and much bounden more than ordinarily any of his ſtate.

Yet notwithſtanding, ſaid Mr. Vice-Chamberlain, you be beloved of all of us, yet juſtice muſt be done without affection or compaſſion; for *Puniantur hi ne tu puniaris;* let the magiſtrate puniſh offenders, leſt himſelf be puniſhed. And again, St. *Auguſtine* ſaith, *Pereat unus. ne pereat unitas*: let

the offender rather be puniſhed, than the unity of the church be confounded.

That their ignorance was no excuſe, that ignorance which was wilful and malicious, only to eſape the puniſhment of law, which is as high an offence as any privity.

That it was a ſillier anſwer of Mr. *Wickſtone*, to ſay his wife deſired him, a great folly to be ruled by her, and ſhe paſſed the modeſty of her ſex to rule him. And Sir *John Perrot* ſaid expreſsly, he thought him worthy of the greater puniſhment for giving ſuch a fooliſh anſwer, as that he did it at his wife's deſire.

The Lord Chancellor gave the aſſembly that ſtood by to note, that theſe priſoners were not the deviſers and makers of theſe books; for if they had, another place had been fit for them, and not this: that the county of *Northampton* did ſwarm with theſe ſectaries, and in one place there was a preſbytery planted among them, till at length one of the brethren had offended, wherefore the other would have puniſhed him; but he, when he ſhould be puniſhed, fled, and complained to a juſtice of peace, and ſo their power ſurceaſed, and all revealed; whereby he noted the vanity of their government: yea, ſaid he, it is proceeded ſo far in that county, that the people were full of contention, and in ſome places had riſen in arms about that quarrel; whereby he concluded it was neceſſary to prevent ſuch miſchief, and to make example of it, and deſired the judges to notify his action herein in their circuits abroad, to the end the whole realm might have knowledge of it, and the people no more ſeduced with theſe lewd libellers. For puniſhment, they all agreed that Sir *Richard* ſhould be fined two thouſand pounds; Mr. *Hales*, a thouſand marks; Mr. *Wickſtone* for obeying his wife, and not diſcovering it, five hundred marks; Mrs. *Wickſtone*, a thouſand pounds; and all of them impriſonment at her majeſty's pleaſure.[a] *State Trials*, vii. 29.

[a] *Camden* ſays, That at this time ſeveral ſcurrilous pamphlets were publiſhed againſt the church of *England* by the Diſſenters; their great patrons and abettors were Sir *Richard Knightley* and *Wickſtone*, perſons in other reſpects ſober and pious, but drawn into the party by ſome inſtruments that were to make a private market of them. However the knights had a pretty round fine laid on them in the *Star-Chamber*, but the archbiſhop of *Canterbury* was ſo generouſly good-natured, as to procure a remiſſion of it at her majeſty's hands. See *Camden's Eliz.* in the complete Hiſtory of *England*, vol. ii. p. 550.

PROCEEDINGS againſt Mr. RICHARD CHAMBERS, in the *Star-Chamber*, for ſeditious Speeches before the Privy-Council, 5 *Cha.* I. 1629.

(The following Account of theſe Proceedings is taken from Ruſhworth's Collections, *vol.* i. *page* 670.)

SIR *Robert Heath*, the king's attorney-general, preferred an information in the *Star-Chamber* againſt Mr. *Richard Chambers* of the city of *London*, merchant. Wherein, firſt, he did ſet forth, the gracious government of the king, and the great privileges which the merchants have in their trading, by paying moderate duties for the goods and merchandizes exported and imported; and ſetting forth, that the raiſing and publiſhing of undutiful and falſe ſpeeches, which may tend to the diſhonour of the king or the ſtate, or to the diſcouragement or diſcontentment of the ſubject, or to ſet diſcord or variance between his majeſty and his good people, are offences of dangerous conſequence, and by the law prohibited, and condemned under ſeveral penalties and puniſhments. That nevertheleſs the ſaid *Richard Chambers*, the 28th day of *September* laſt, being, amongſt other merchants, called to the council-board at *Hampton-Court*, about ſome things which were complained of in reference to the cuſtoms, did then and there, in an inſolent manner, in the preſence or hearing of the lords and other of his majeſties privy-council, then ſitting in council, utter theſe undutiful, ſeditious, and falſe words, "That the merchants are in no part of the world ſo ſcrewed and wrung as in *England*; that in *Turkey* they have more encouragement." By which words, he the ſaid *Richard Chambers*, as the information ſetteth forth, did endeavour to alienate the good affection of his majeſties ſubjects from his majeſty, and to bring a ſlander upon his juſt government: and therefore the king's attorney prayed proceſs againſt him.

To this Mr. *Chambers* made anſwer, that having a caſe of ſilk grogerams brought from *Briſtol* by a carrier to *London*, of the value of 400l. the ſame were, by ſome inferior officers, attending on the *Cuſtom-Houſe*, ſeized without this defendant's conſent, notwithſtanding he offered to give ſecurity to pay ſuch cuſtoms as ſhould be due by law; and that he hath

hath been otherwiſe grieved and damnified, by the injurious dealing of the under-officers of the *Cuſtom-Houſe*: and mentioned the particulars wherein; and that being called before the lords of the council, he confeſſeth, that out of the great ſenſe which he had of the injuries done him by the ſaid inferior officers, he did utter theſe words, "That the merchants in *England* were more wrung and ſcrewed than in foreign parts." Which words were only ſpoken in the preſence of the privy-council, and not ſpoken abroad, to ſtir up any diſcord among the people; and not ſpoken with any diſloyal thought at that time of his majeſty's government, but only intending by theſe words to introduce his juſt complaint againſt the wrongs and injuries he had ſuſtained from the inferior officers; and that as ſoon as he had heard a hard conſtruction was given of his words, he endeavoured by petition to the lords of the council, humbly to explain his meaning, that he had not the leaſt evil thought as to his majeſty's government; yet was not permitted to be heard, but preſently ſent away priſoner to the *Marſhalſea*: and when he was there a priſoner, he did again endeavour by petition to give ſatisfaction to the lords of the council; but they would not be pleaſed to accept of his faithful explanation, which he now makes unto this honourable Court upon his oath; and doth profeſs from the bottom of his heart, "That his ſpeeches only aimed at the abuſes of the inferior officers, who in many things dealt moſt cruelly with him and other merchants."

There were two of the clerks of the privy-council examined as witneſſes to prove the words, notwithſtanding the defendant confeſſed the words in his anſwer as aforeſaid, who proved the words as laid in the information. And on the ſixth of *May*, 1629, the cauſe came to be heard in the *Star-Chamber*, and the Court were of opinion, that the words ſpoken were a comparing of his majeſty's government with the government of the *Turks*; intending thereby to make the people believe that his majeſty's happy government may be termed *Turkiſh* tyranny; and therefore the court fined the ſaid Mr. *Chambers* in the ſum of 2000l. to his majeſty's uſe, and to ſtand committed to the priſon of the *Fleet*, and to make ſubmiſſion for his great offence, both at the council-board, in Court of *Star-Chamber*, and at the *Royal Exchange*.[a]

And accordingly the copy of the ſubmiſſion was ſent to the warden of the *Fleet*, from Mr. Attorney-General, to ſhew the ſaid *Richard Chambers*, to perform and acknowledge it; and was as followeth: "I *Richard*

[a] There can be no greater panegyric on the preſent ſtate of the adminiſtration of public juſtice, and the mildneſs of the government than is diſplayed by theſe old proſecutions.

" I *Richard Chambers*, of *London*, merchant, do humbly acknowledge, that whereas upon an information exhibited againſt me by the king's attorney-general, I was in *Eaſter-Term* laſt ſentenced by the honourable court of *Star-Chamber*, for that in *September* laſt, 1628, being convented before the lords and others of his majeſty's moſt honourable privy-council-board, upon ſome ſpeeches then uſed concerning the merchants of this kingdom, and his majeſty's well and gracious uſage of them; did then, and there, in inſolent, contemptuous, and ſeditious manner, falſely and maliciouſly ſay and affirm, " That they," meaning the merchants, " are in no parts of the world ſo ſcrewed and wrung as in *England;* and that in *Turkey* they have more encouragement." And whereas by the ſentence of that honourable court, I was adjudged, among other puniſhments juſtly impoſed upon me, to make my humble acknowledgement and ſubmiſſion of this great offence at this honourable board, before I ſhould be delivered out of the priſon of the *Fleet*, whereto I was then committed, as by the ſaid decree and ſentence of that court, among other things, it doth and may appear: now I the ſaid *R. Chambers*, in obedience to the ſaid honourable court, do humbly confeſs and acknowledge the ſpeaking of theſe words aforeſaid, for the which I was ſo charged, and am heartily ſorry for the ſame; and do humbly beſeech your lordſhips all to be honourable interceſſors for me to his majeſty, that he would be graciouſly pleaſed to pardon this great error and fault ſo committed by me."

When Mr. *Chambers* read this draught of ſubmiſſion, he thus ſubſcribed the ſame:

> " All the aboveſaid contents and ſubmiſſion, I *Richard Chambers* do utterly abhor and deteſt, as moſt unjuſt and falſe; and never till death will acknowledge any part thereof.
>
> " *Rich. Chambers.*"

Alſo he under-writ theſe texts of ſcripture to the ſaid ſubmiſſion, before he returned it.

" That make a man an offender for a word, and lay a ſnare for him that reproveth in the gate, and turn aſide the juſt for a thing of nought.

" Blame not before thou haſt examined the truth; underſtand firſt, and then rebuke: anſwer not before thou haſt

heard the cauſe, neither interrupt men in the midſt of their talk.

"Doth our law judge any man before it hear him, and know what he doeth?

"King *Agrippa* ſaid unto *Paul*, thou art permitted to ſpeak for thyſelf.

"Thou ſhalt not wreſt the judgment of the poor in his cauſe, thou ſhalt not reſpect perſons, neither take a gift: for a gift doth blind the eyes of the wiſe, and pervert the eyes of the righteous.

"Wo to them that deviſe iniquity, becauſe it is in the power of their hand, and they covet fields, and take them by violence; and houſes, and take them away; ſo they oppreſs a man and his houſe, even a man and his heritage.

"Thus ſaith the Lord God, let it ſuffice you, O princes of *Iſrael;* remove violence and ſpoil, and execute judgment and juſtice, take away your exactions from my people, ſaith the Lord God.

"If thou ſeeſt the oppreſſion of the poor, and the violent perverting of judgment and juſtice in a province, marvel not at the matter: for he that is higher than the higheſt regardeth, and there be higher than they.

Per me, *Richard Chambers.*"

Richard Chambers afterwards applied to the Court of *Exchequer* to be diſcharged from the ſentence, on the grounds that the fine was unreaſonable, and that the ſtatute 3 Hen. VII. which is the foundation of the Court of *Star-Chamber*, doth not give the Lords thereof any authority to puniſh for words only. But the court ſaid, that the *Star-Chamber* was not erected by ſtatute 3 *Hen.* VII. but was a Court many years before; and to deliver one who was committed by the decree of one of the Courts of juſtice, was not the uſage of this Court: he was therefore remanded to priſon, where he remained ſix years.

It appears from a petition preſented by him to the long parliament, during the commonwealth, in 1654, that he had ſuffered great loſſes and injuries, and which, as ſtated by him, were the conſequences of his acting for the public good, and therefore prayed ſome reparation; but being wearied out with twelve years attendance, he grew infirm, and not being relieved, was reduced to a low eſtate and condition, and died in ſummer, 1658, at ſeventy years of age. *State Trials*, XI. 118.

PROCEEDINGS in the *Star-Chamber*, againſt Dr. ALEXANDER LEIGHTON, for a Libel, 4 *June*, 6 *Cha.* I. 1630.

[*The following report of this caſe is extracted from* 2 Ruſhworth, 55. *Mrs.* Macauley, *in her hiſtory, comments on the proceedings againſt Dr.* Leighton *with great ſeverity.* 2 Macaul. Hiſt. 91. *Indeed the cruelty of the ſentence is beyond excuſe.*] Hargrave.

AN information formerly exhibited in the *Star-Chamber* againſt *Alexander Leighton*, a *Scotſman* born, and a doctor of divinity came to be heard the 4th of *June* in the Court of *Star-Chamber*, for framing a book entitled, "An appeal to the Parliament, or a Plea againſt Prelacy," which he printed and publiſhed, during the ſitting of the laſt parliament; and delivered it to divers perſons in a way of preſenting juſt complaints (as he gave out) to the then commons houſe of parliament, 4 *Carol.* I.

The defendant was charged by the ſaid information with framing, publiſhing, and diſperſing a ſcandalous book againſt king, peers, and prelates, wherein amongſt other things he ſets forth theſe falſe and ſeditious aſſertions and poſitions following.

1. "That we do not read of greater perſecution and higher indignity done upon God's people in any nation profeſſing the Goſpel, than in this our iſland, eſpecially ſince the death of Queen *Elizabeth*.

2. "He terms the prelates of this realm "Men of blood," and enemies to God and the ſtate, and ſaith, that the maintaining and eſtabliſhing of biſhops within this realm is a main and maſter-ſin eſtabliſhed by law, and that miniſters ſhould have no voices in council deliberative and deciſive.

3. "He avowed the prelacy of our church to be antichriſtian and ſatanical; and terms the biſhops, "Ravens" and "Magpies," that prey upon the ſtate.

4. "He terms the canons of our church, made anno 1603, "Nonſenſe canons."

5. "He diſallowed and contemned the ceremony of kneeling in the receiving the ſacrament, alledging that the ſuggeſtion of falſe fears to the king by the prelacy, and the ſeeking of their own unlawful ſtanding, brought forth that received

ſpawn of the beaſt, kneeling at the receiving of the ſacrament.

6. "He affirms that the prelates did corrupt the king, foreſtalling his judgment againſt God and goodneſs; and moſt audaciouſly and wickedly calleth his majeſty's royal conſort, our gracious queen, "The daughter of *Heth*."

7. "He moſt impiouſly ſeems to commend him that committed the barbarous and bloody act of murdering the late duke of *Buckingham*; and to encourage others to ſecond him in the like wicked and deſperate attempt, to the deſtruction of others.

8. "He layeth a moſt ſeditious ſcandal upon the king, ſtate, and kingdom, wickedly affirming, "That all that paſs by us ſpoil us, and we ſpoil all that rely upon us:" and amongſt other particulars, inſtanceth the black pining death of the famiſhed *Rochelers*, to the number of 15,000 in four months: by which paſſages and wicked poſitions and aſſertions, he did, as much as in him lay, ſcandalize his majeſties ſacred perſon, his religious wife and juſt government, the perſon of his royal conſort the queen, the perſons of the lords and peers of this realm, eſpecially the reverend biſhops.

9. "That in another place of the ſaid book, endeavouring to ſlander not only his majeſty's ſacred perſon and government, but alſo to detract from his royal power, in making laws and canons for government eccleſiaſtical; and in matters concerning the church, he ſaith, that the church hath her laws from the Scripture, and that no king may make laws in the houſe of God: for if they might, then the Scripture might be imperfect.

10. "And further charged, that in another place of the ſaid book, thinking to ſalve all with an expreſſion of his ſacred majeſty, he hath theſe words following; "What pity it is, and indelible diſhonour it will be to you the ſtates repreſentative, that ſo ingenious and tractable a king ſhould be ſo monſtrouſly abuſed, to the undoing of himſelf and his ſubjects!"

The defendant in his anſwer confeſſed the writing of the book, but with no ſuch ill intention, as by the ſaid information is ſuggeſted; his end therein being only to remonſtrate certain grievances in church and ſtate, under which the people ſuffered, to the end the parliament might take them into conſideration, and ſo give ſuch redreſs, as might be for the honour of the king, the quiet of the people, and the peace of the church.

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At the hearing of the cauſe, the defendant's anſwer was read at large, and the aforeſaid particulars charged in the information as ſeditious and ſcandalous, were alſo read out of the book. After which the Court proceeded to give ſentence, and did there declare, that it evidently appeared upon proof, that the defendant had printed five or ſix hundred of the ſaid books, and that in their opinions he had committed a moſt odious and heinous offence, deſerving the ſevereſt puniſhment the Court could inflict, for framing and publiſhing a book ſo full of moſt peſtilent, deviliſh and dangerous aſſertions, to the ſcandal of the king, queen, and peers, eſpecially the biſhops.

The two lord chief juſtices being preſent, delivered their opinions, that they would without any ſcruple have proceeded againſt the defendant as for treaſon committed by him, if it had come before them; and other lords expreſsly affirmed, that it was his majeſties exceeding great mercy and goodneſs, that he was brought to receive the cenſure of this Court, and not queſtioned at another tribunal as a traitor.

And their lordſhips by an unanimous conſent adjudged and decreed, that Dr. *Leighton* ſhould be committed to the priſon of the *Fleet*, there to remain during life, unleſs his majeſty ſhall be graciouſly pleaſed to enlarge him; and he ſhall pay a fine of 10,000 *l.* to his mejeſty's uſe.

And in reſpect the defendant hath heretofore entered into the miniſtry, and this Court, for the reverence of that calling, doth not uſe to inflict any corporal or ignominious puniſhment upon any perſon, ſo long as they continue in orders, the Court doth refer him to the High-commiſſion, there to be degraded of his miniſtry; and that being done, he ſhall then alſo for further puniſhment and example to others, be brought into the pillory at *Weſtminſter* (the Court ſitting), and there whipped, and after his whipping be ſet upon the pillory, for ſome convenient ſpace, and have one of his ears cut off, and his noſe ſlit, and be branded in the face with a double S S, for a ſower of ſedition; and ſhall then be carried to the priſon of the *Fleet*, and at ſome other convenient time afterwards ſhall be carried into the pillory at *Cheapſide*, upon a market-day, and be there likewiſe whipt, and then be ſet upon the pillory, and have his other ear cut off, and from thence be carried back to the priſon of the *Fleet*, there to remain during life, unleſs his majeſty ſhall be graciouſly pleaſed to enlarge him.

The ſentence being given towards the end of *Trinity-term*, and the Court not uſually ſitting after the term, unleſs upon emergent occaſions, and it requiring ſome time in the *Eccleſiaſti-*

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cal Court, in order to the degradation of the defendant, it was *Michaelmas-term* following before any part of the ſentence could be put in execution; but *November* the 4th he was accordingly degraded, and on *Wedneſday*, *November* the 10th (being a *Star Chamber* day) he was to have undergone the execution of this ſentence; but the evening before he eſcaped out of the *Fleet*, where he had been kept a cloſe priſoner, and information hereof being given to the lords of the privy-council, they ordered this hue and cry to be printed to retake him.

A Hue and Cry againſt Dr. Leighton, *by order of the Privy-Council.*

"Whereas *Alexander Leighton*, a *Scottiſh* man born, who was lately ſentenced by the honourable Court of *Star Chamber*, to pay a great fine to his majeſty, and to undergo corporal puniſhment, for writing, printing, and publiſhing a very libellous and ſcandalous book againſt the king, and his government, hath this eleventh day of November eſcaped out of the priſon of the *Fleet*, where he was a priſoner: theſe are in his majeſty's name to require and command all juſtices of peace, mayors, ſheriffs, bayliffs, cuſtomers, ſearchers and officers of the ports, and all other his majeſties loving ſubjects, to uſe all diligence for the apprehending of the ſaid *Alexander Leighton*; and being apprehended, ſafely to keep him in cuſtody, until his majeſty ſhall receive notice thereof, and ſhall give further direction concerning him. He is a man of low ſtature, fair complexion; he hath a yelloviſh beard, a high forehead, between forty and fifty years of age."

This hue and cry followed him to *Bedfordſhire*, where he was apprehended, and brought again priſoner to the *Fleet*. Concerning whoſe eſcape, and executing of the ſentence upon him afterwards, the biſhop of *London* in his diary, on the 4th of *November*, makes this memorial, viz.

"*Leighton* was degraded at the High Commiſſion, *Tueſday* the 9th of *November*; that night *Leighton* broke out of the *Fleet*, the warden ſays he got or was helped over the wall, and moreover profeſſed he knew not this till *Wedneſday* noon; he told it not me till *Thurſday* night. He was taken again in *Bedfordſhire* and brought back to the *Fleet*, within a fortnight. *Friday November* the 16th, part of his ſentence was executed upon him in this manner, in the new palace at *Weſtminſter*, in term time:

1. "He

1. " He was ſeverely whipt before he was put in the pillory.
2. " Being ſet in the pillory, he had one of his ears cut off.
3. " One ſide of his noſe ſlit.
4. " Branded on one cheek with a red hot iron, with the letters S S, ſignifying a ſtirrer up of ſedition, and afterwards carried back again priſoner to the *Fleet*, to be kept in cloſe cuſtody.

" And on that day ſeven night, his ſores upon his back, ear, noſe, and face being not cured, he was whipt again at the pillory in *Cheapſide*, and there had the remainder of his ſentence executed upon him, by cutting off the other ear, ſlitting the other ſide of the noſe, and branding the other cheek."

The ſevere puniſhment of this unfortunate gentleman many people pitied, he being a perſon well known both for learning and other abilities; only his untempered zeal (as his countrymen then gave out) prompted him to that miſtake, for which the neceſſity of affairs at that time required this ſeverity from the hand of the magiſtrate, more than perhaps the crime would do in a following juncture.

Afterwards thoſe who procured his eſcape were taken and brought into the *Star Chamber*, and proceeded againſt, viz.

The defendant practiſing with one *Leighton*, a notable offender, to procure his eſcape out of the *Fleet; Levingſton* put off his cloak, hat, and breeches, being all of a grey colour, *Anderſon* his doublet, and *Leighton* put theirs on, and in that diſguiſe they all went out of the *Fleet* unſuſpected; afterwards taken again, and for theſe offences, and reſpect had of their penitency, they were only fined 500*l.* a-piece, and committed to the *Fleet* during the king's pleaſure[a]. *State Trials*, XI. 120.

[a] In 1641 the houſe of commons came to ſeveral reſolutions in condemnation of the proceedings againſt Dr. *Leighton*. Particularly, they reſolved, that the fine and corporal puniſhment and impriſonment by the ſentence of the *Star Chamber* were illegal, and that he ought to have ſatisfaction for his ſufferings and damages. *Journ. Comm.* 21, *April* 1641. *Hargrave.*

PROCEEDINGS

Proceedings in the *Star-Chamber*, 29 *May*, 6 *Cha.* I. 1630, againſt the Earl of BEDFORD, the Earl of CLARE, the Earl of SOMERSET, Sir ROBERT COTTON, JOHN SELDEN, Eſq; OLIVER ST. JOHN, Eſq; and others, for publiſhing a ſeditious and ſcandalous Writing.

[The written piece, which gave occaſion to theſe proceedings, was a moſt unconſtitutional project for advancing the king's prerogative and revenue. It appears to have been ſent over from *Italy* by the famous Sir *Robert Dudley*, ſon of queen *Elizabeth*'s favourite the earl of *Leiceſter*; and Sir *Robert* is ſuppoſed to have been the author; though if that were really ſo, it highly reflects on one, who on other accounts is tranſmitted to us with high encomiums for his mental endowments and accompliſhments, as the reader will ſee by conſulting Sir *William Dugdale*. See 2 *Dugd. Baron.* 222. It is probable, that the proſecution was commenced, in order to exculpate both *James* and *Charles* the Firſt, with their reſpective miniſters, from the imputation of approving of the project. It may ſeem ſurprizing to the reader, that ſuch perſons as Mr. *Selden*, and the other defendants named, except the earl of *Somerſet*, ſhould lie under a ſuſpicion of countenancing propoſitions ſo irreconcilable with their political profeſſions and conduct at the time. But, as there can be no reaſon for ſuppoſing that they gave their approbation to ſuch arbitrary propoſals, they were included in the proſecution from a ſuſpicion of having encouraged a belief, that the king ſecretly favoured the ſcheme and meditated to execute it. On conſulting the book entitled the "Annals of *James* and *Charles* the Firſt," we obſerve that the author adapts a like conſtruction, adding that the piece in queſtion was written by Sir *Robert Dudley* at *Florence*, in 1613. See page 361.

We ſhall now lay before the reader, ſome extracts of the writing which was the cauſe of the proſecution; and ſecondly

condly the account of the proceedings in the Star-chamber; for both of which we are obliged to Mr. *Ruſhworth.*] *Hargrave.*

Extract from Ruſhworth's Appendix *to his* Hiſtorical Collections, *vol.* 1. *page* 12.

A Propoſition for his Majeſty's Service to bridle the Impertinence of Parliaments.

THE propoſition for your majeſty's ſervice, containeth two parts: the one to ſecure your ſtate, and to bridle the impertinence of parliaments; the other, to increaſe your majeſty's revenue, much more than it is. The following are ſhort extracts from this writing.

1. Touching the firſt, having conſidered divers means, I find none ſo important to ſtrengthen your majeſty's regal authority, againſt all oppoſitions and practices of troubleſome ſpirits, and to bridle them, than to fortify your kingdom, by having a fortreſs in every chief town. 2. Becauſe in policy, there is a greater tie of the people by force and neceſſity, than merely by love and affection; for by the one, the government reſteth always ſecure; but by the other, no longer than the people are contented. It forceth obſtinate ſubjects to be no more preſumptuous, then it pleaſeth your majeſty to permit them. 3. It is a ſure remedy againſt rebellion, and popular mutinies. Your majeſty's government is the more ſecure, by the people's more ſubjection; and by their ſubjection, your parliament muſt be forced conſequently to alter their ſtyle, and to be conformed to your will and pleaſure.

For theſe, and divers other weighty reaſons, it may be conſidered in this place, to make your majeſty more powerful and ſtrong, ſome orders be obſerved, that are uſed in fortified countries. *Imprimis*, that none wear arms or weapons at all either in city or country, but ſuch as your majeſty may think fit to privilege, and they to be enrolled. That the ſoldiers of the fortreſſes be ſometimes choſen of another nation. 4. That the gates of the city be ſhut all night, and keys kept by the mayor or governor. Innkeepers to deliver the names of all unknown paſſengers that lodge in their houſes.

Your majeſty may find by the ſcope of this diſcourſe, the means ſhewed in general to bridle your ſubjects, that may be either diſcontent or obſtinate. A general oath that all your majeſty's ſubjects do acknowledge you to be as abſolute a king and monarch within your dominions, as is among

among the chriſtian princes; and your prerogative as great; whereby you may and ſhall of yourſelf, by your majeſty's proclamation, as well as other ſovereign princes doing the like, either make laws, or reverſe any made, with any other act ſo great a monarch as yourſelf may do, and that without further conſent of a parliament, or need to call them at all in ſuch caſes. How neceſſary the dangerous ſupremacy of parliament's uſurpations is to be prevented, the example of *Lewis* the Eleventh, king of *France*, doth manifeſt, who found the like oppoſition as your majeſty doth, and by his wiſdom ſuppreſſed it.

To increaſe your majeſty's revenue. *Imprimis*, the firſt means or courſe intended to increaſe your majeſty's revenues or profits withal, is of great conſequence, and I call it a *decimation*, being ſo termed in *Italy*, where in ſome part it is in uſe, importing the tenth of all ſubjects eſtates, to be paid as a yearly rent to their prince, and as well monied-men in towns, as landed-men in the countries, their value and eſtates eſteemed juſtly as it is to the true value, though with reaſon. *Item*, whereas the lawyers fees and gains in *England* be exceſſive, to your ſubjects prejudice; it were better for your majeſty to make uſe thereof, and impoſe on all cauſes ſentenced with the party, to pay five pounds per cent. of the true value that the cauſe hath gained him; and for recompence thereof, to limit all lawyers fees and gettings, whereby the ſubject ſhall ſave more in fees and charges, then he giveth to your majeſty in the *gabella*, which I believe may be worth, one year with another, fifty thouſand pounds. *Item*, all offices in the land, great and ſmall, in your majeſty's grant, may be granted, with condition, to pay you a part yearly according to the value. *Item*, to reduce your majeſty's houſhould to board-wages, as moſt other princes do, reſerving ſome few tables. Other courſes alſo, that may make preſent money, I ſhall ſtudy for your majeſty's ſervice, and, as I find them out, acquaint you withal. Laſtly to conclude all theſe diſcourſes, by the application of this courſe uſed for your profit, that it is not only the means to make you the richeſt king that ever *England* had, but alſo the ſafety augmented thereby to be moſt ſecure, beſides what was ſhewed in the firſt part of this diſcourſe; I mean by the occaſion of this taxation, and raiſing of monies, your majeſty ſhall have cauſe and means to employ in all places of the land ſo many officers and miniſters, to be obliged to you for their own good and intereſt, as nothing can be attempted againſt your perſon, or royal ſtate, over land, but ſome of them ſhall, in all probability, have

means

means to find it out, and hinder it. Beſides, this courſe will detect many diſorders and abuſes in the public government, which were hard to be diſcovered by men indifferent. To prohibit gorgeous and coſtly apparel to be worn, but by perſons of good quality, ſhall ſave the gentry of the kingdom much more money, than they ſhall be taxed to pay unto your majeſty. Thus withal I take my leave, and kiſs your gracious hand, deſiring pardon for my error I may commit herein.

ON the 29th of *May*, 1630, this cauſe was heard in the *Star-Chamber*. After the king's attorney-general opened the information, the anſwer of *Robert* earl of *Somerſet* to the ſaid information, was alſo opened by his council, to this effect:

That the diſcourſe, as he believed, was either the ſame that was ſhewed him in the time of his attendance near his late majeſty king *James*, or had many of the ſame things in it: and finding no cauſe of concealing a propoſition made in a former king's time, and having no apprehenſion, that ſcandal to his majeſty, or the preſent government, might thereby happen, he caſually imparted it to the earls of *Bedford* and *Clare*, who, after peruſal thereof, delivered their opinions concerning it, at their next meeting; 'that it was a phantaſtick project of ſome brain-ſick traveller, who had made collections of ſome princes of *Italy*, and other foreign ſtates, no way ſuitable to the government of this kingdom.'

And further ſaid, that (beſides that one time) there was never any conference, nor any paſſage by letter or otherwiſe, betwixt them concerning it, or with any other perſon, and denied that he either contrived the propoſition, or knew of the contriving thereof, or ever imagined that his majeſty would innovate the ancient form of government, diſpoſe of the eſtates of his ſubjects without their conſent, make or repeal laws by proclamation without conſent of parliament, plant garriſons in his principal cities and towns, or put in execution any part of the ſaid diſcourſe: and the reaſon why he did not preſent the diſcourſe to his majeſty, or ſome of the lords of the council, or ſome magiſtrates, was, becauſe he did not conceive the ſame did in any ſort concern the time of his majeſties government, but was contrived in ſome former time, as appeared manifeſtly, by the particulars therein contained; and that about ſixteen or ſeventeen years ago, Sir *David Fowles* ſhewed him the project, to whom he replied, 'that he was ſatisfied no uſe could be made thereof, and ſo he re-delivered it, and concluded that the devulging

thereof was in his opinion pardoned by the general pardon granted upon his now majeſties coronation.'

The reſt of the defendants denied any their contrivance thereof, alleging the author (as they were informed) was living beyond ſea, and that they ought not to be queſtioned for it, being writ in the time of king *James*, and not in reference to his now majeſties government, denying that they had the leaſt thought or intention to ſcandalize the government; for that they rejected the diſcourſe as ſoon as they read it, as a fooliſh and impertinent iſſue of ſome projecting brain; and they averred their deteſtation of ſuch a project, and that they bore loyal hearts to his majeſty, and bleſſed God for the happy and peaceable government under him.

After the publication of the cauſe in order to a hearing, it appeared by the depoſitions of Sir *David Fowles*, that he received the ſaid writing from one Mr. *Yates*, in the time of king *James*, who brought it from Sir *Robert Dudly* at *Florence* together with a letter, deſiring him to deliver it to the earl of *Somerſet*, that he might communicate it to king *James*, which was done accordingly, and that in his hearing the earl ſignified a diſlike thereof; and that he received it back from the earl (being the original) and kept it by him till the lords of the council ſent for it, and that he made no copy thereof.

It appeared alſo by the depoſitions of other witneſſes, that this diſcourſe, nine years ago, was bought by them in *Little-Britain* amongſt other manuſcripts.

So this cauſe coming in hearing, a great preſence of nobility being in court, the attorney-general opened the charge. But before much proceeding, his majeſty ſent word unto the lord keeper *Coventry*, then in court, that the queen was brought to bed of a ſon, and a private meſſage alſo was delivered to him from the king; whereupon the lord keeper declared in court, that his moſt ſacred majeſty had taken this matter into his moſt ſerious conſideration, and although the ſame was of ſo high a nature, as it was neceſſary to be brought in queſtion, (being contrary to many laws and ſtatutes, and the common law itſelf) yet his majeſty balancing the ſame in the ſcales of juſtice and mercy (the author of the diſcourſe being diſcovered to live beyond the ſeas) found theſe defendants rather fitting to be objects of his mercy, than juſtice, they being ſome of them noblemen, and ſuch as his majeſty did and doth well eſteem and like of, in his royal opinion: and that his majeſty was the rather inclined to extend his goodneſs, in regard of the time; it having now pleaſed the great juſtice of heaven to bleſs his majeſty

and

and his kingdom with a royal iſſue of his body, a hopeful prince, the great joy and long expectations both of king and kingdom.

Upon this declaration of the king's pleaſure, the lord keeper made known, that the court by his majeſties ſpecial command was to proceed no further in the hearing of this cauſe: but order the project, or book, to be burnt, as ſeditious and ſcandalous both to his majeſty, the ſtate, and government of this kingdom. And ordered the proceedings to be taken off the file. *State Trials*, XI. p. 121.

The TRIAL of WILLIAM PRYNNE, Eſq; for a Libel, entitled, "Hiſtriomaſtix; or, a Scourge for Stage Players, &c." as alſo of MICHAEL SPARKES, for Printing, and WILLIAM BUCKNER, for Licenſing the ſaid Libel; and four others, concerned in Printing Part of it; before the Court of *Star-Chamber*, in *Hillary-Term*, 1633-4. 9 *Car.* I.

THE information was brought in the name of the attorney-general *Noy*, and ſet forth, that the defendant, *Prynne*, compiled and put the ſaid libel to preſs, condemning all plays, dancings, maſques, feſtivals, *&c.* And though he knew their majeſties, and the miniſters of ſtate, were ſometimes preſent at ſuch entertainments, yet the defendant railed and inveighed againſt them, and all that were preſent at them: that he condemned hunting, and all other rural ſports; the keeping *Chriſtmas*, and other publick feſtivals, and holy days; and even the making of bonfires, the erecting may-poles, and the dreſſing up houſes with ivy; endeavouring to move and incite the people to rebellion, and to lay violent hands on their prince, for ſuffering ſuch things: that this libel alſo contained many infamous expreſſions againſt his majeſty, and his houſhold, and caſt ſeveral aſperſions on the queen, and uncharitable cenſures on all chriſtian people, recommending factious and diſcontented perſons, ſuch as Dr. *Leighton*, and *Mariana* the jeſuit, in order

order to withdraw the king's ſubjects from their allegiance; that he dealt with *Sparkes*, a common publiſher of unlawful books, to print this libel; and with *Buckner*, another defendant, to licence it; and with the other four defendants, to print part of the ſame, to the great ſcandal of the government, &c.

Prynne, in his anſwer, confeſſed his compiling of the ſaid book, which he ſaid, was nothing elſe but a collection of arguments, againſt ſtage-plays; and he did not intend to reflect on the king and ſtate; and that it was duly licenſed, and entered at *Stationers-Hall*, as the law required: that he was ſo far from encouraging ſchiſm and ſedition, that he had with much joy and thankfulneſs acknowledged the happineſs and peace, he, and the reſt of his majeſty's ſubjects, enjoyed under his government: and if any thing in his book ſhould, contrary to his deſign, be conſtrued to tend to ſchiſm, or ſedition, he craved pardon and grace; and deſired the Court to take into their conſideration, that he had already been a year priſoner in the *Tower*.

The attorney-general obſerved, in opening the charge, that the defendant's book was the evidence againſt him, where he did not only rail at plays and dancing, and at his majeſty, the court, and all that were preſent at them, but againſt hunting, rural ſports, feſtivals, holy days, biſhops, church-muſick, and church-ceremonies, promiſcuouſly; and even againſt the long hair of men and women, and perukes; and againſt cards, tables, and all manner of diverſions; inſinuating we were returning into paganiſm again; and adviſing people to leave the kingdom, and go and ſerve God in other countries: that, though it might be lawful for thoſe that had a miſſion, to write againſt the abuſe of plays in modeſt terms, that would not excuſe Mr. *Prynne*, who could pretend to no ſuch miſſion, and had raked together all the vileſt terms, and *Billingſgate* language, to revile the government, and all mankind.

Then ſeveral obnoxious paſſages were read out of the book, as evidence againſt him; and particularly that, where he reſembled his majeſties government to that of *Nero*'s, (viz) "The multitude of our *London* play-hunters are ſo augmented, that all the antient devils chapels, though five in number, are not ſufficient to contain their troops; whence we ſee a ſixth now added to them: whereas, in vicious *Nero*'s reign, there were but three ſtanding theatres in pagan *Rome*, though far more ſpacious than chriſtian *London*:" in the ſame libel, he calls church-muſick, "the bleating of brute beaſts;" and ſays, "the choriſters bellow the tenor,

tenor, as if they were oxen: bark a counter-point, like a kennel of dogs; roar a treble, as if they were bulls; and grunt a baſe, like a parcel of hogs."

The defendant's counſel ſaid in his defence, that many of the paſſages in his book were relatively ſpoken, and moſt of them the opinion of other authors; and, that he had no thought of comparing the preſent times with thoſe of *Nero*'s; but they could not wholly excuſe him: they ſuppoſed he had ſo fixed his eyes on the abuſes of the ſtage, that he had neglected to guide his pen; and adviſed him to lay hold on the rock of the king's favour, and the mercy of the Court: they begged, their lordſhips would believe his intentions were fair and honeſt, though his expreſſions harſh; and hoped, that the abuſe of plays would a little plead his excuſe: that thoſe who had licenſed the book, were rather guilty than he; and none but unlicenſed books had yet been brought before that Court: that the charge againſt him was made out by inferences and conſequences that were forced and ſtrained; and that the paſſages quoted did not of neceſſity carry that meaning that had been put upon them; deſiring their lordſhips would conſtrue his intentions as he had explained them in his anſwer upon oath; and, as that had been admitted evidence againſt him, as to his compiling the book, ſo they would admit it to be evidence for him, to clear the integrity of his heart.

Three *Star-Chamber* days having been ſpent in the hearing of this cauſe, the lords ſat the fourth day to proceed to ſentence, which held till four in the afternoon; and they paſſed ſuch ſentence on Mr. *Prynne*, as is expreſſed in the enſuing ſpeeches, which, in effect comprehend all that was ſaid by others.

The firſt was of *Francis* Lord *Cottington*, chancellor of the *Exchequer*, whoſe turn was to begin firſt to ſpeak, as being in the loweſt degree of quality by his place. And commonly he that beginneth, as he openeth the matter at large, ſo he inclineth therebymany lords to forbear making of ſpeeches, and only to declare themſelves to concur in ſentence with him that began firſt, or with ſome other lord that ſpake before, as their judgments lead them.

My lords (ſaid my Lord *Cottington*) his majeſty's attorney-general hath brought Mr. *Prynne* before your lordſhips, with other defendants, *Thomas Buckner*, *Michael Sparkes*, &c. It is for publiſhing a libellous book, or volume of libels, to the ſcandal of his majeſty and the ſtate. To my underſtanding it may be more properly ſaid, the great and high malice

of

of Mr. *Prynne*, publiſhed and declared in that libellous book; a malice expreſſed in a manner againſt all mankind, and the beſt ſort of mankind, againſt king, prince, peers, prelates, magiſtrates, and governors, and truly in a manner againſt all things. But that which hath been more remarkable, is, his ſpleen againſt the church and government of it; therefore for that I will not ſentence him, (becauſe Mr. Attorney doth forbear to proſecute againſt him, for that which belongeth to the church) yet it is an argument of his great and high malice: and when I conſider of that, which hath been ſo often repeated, that he writ this book alone, ſurely he was aſſiſted immediately by the devil himſelf, or rather he hath aſſiſted the devil. He hath written a book againſt the due reverence and honour, which all Chriſtians owe to our Saviour Jeſus; this doth convince my judgment againſt him; but the book (as Mr. Attorney ſaith) declares the man, it is the witneſs: and if your lordſhips obſerve the particulars and ſtyle of it, you will ſay it is a ſtrange thing; the very ſtyle doth declare the intent of the man, and that is (as Mr. Attorney ſaid) to work a diſcontent and diſlike in the king's people againſt the church and government, and diſobedience to our gracious ſovereign the king. If Mr. *Prynne* ſhould be demanded what he would have, he liketh nothing, no ſtate or ſex; muſick, dancing, &c. unlawful even in kings; no kind of recreation, no, not ſo much as hawking, all are damned. The very truth, Mr. *Prynne* would have a new government, he would have a new church, he would have new laws, new entertainment, God knows what he would have; a new king he would have, and have all the people of his mind, to be diſcontented with their king and government.

Mr. *Prynne* confeſſeth he did write the book, and it is true he did endeavour the printing of it, and the publiſhing of it, this is proved very well; yea, but Mr. *Prynne* had no other intention but a tenderneſs of conſcience, he meant no hurt to the king or ſtate (as his counſel ſaid:) but Mr. Attorney anſwered them, that he is not the declarer of his intentions, he muſt be judged by the book, by his words, more certainly by the effect; for all good men do receive ſcandal by this book, and all of Mr. *Prynne*'s humour were glad of this book. When I conſider what kind of libel it is, it is not like other libels: other libels have been by perſons diſcontented, ſome poor rogues, ſcattered up and down; but here's a libel in folio, and in print, and juſtifieth itſelf by authors with an high hand, *That is there*, and *that is there*. And (my lords) when I conſider thoſe high paſſages in his book, I proteſt unto you, they are things to be abhorred; they are

not ſpoken relatively (as his counſel would have it) but poſitively, that "Our *Engliſh* ladies, ſhorn and frizled Madams, have loſt their modeſty; that the devil is only honoured in dancing; that plays are the chief delight of the devil; that they that frequent plays are damned, and ſo are all that do not concur with him inhis opinion, whores, panders, foul incarnate devils, Judas's to their lord and maſter, &c. Princes dancing in their own perſons," his cenſure of them is infamous, &c. But the fouleſt of all is, "That this was the cauſe of untimely ends in princes."

My lords, ſhall not all that hear theſe things think, that it is the mercy of the king that Mr. *Prynne* is not deſtroyed? Have we not ſeen men lately condemned to be hanged and quartered for far leſs matters? one *Pinchman*, I was myſelf employed with others in the examining of him; he confeſſed, that the writing for which he was queſtioned, was a ſermon, that he did intend to preach: the words were againſt the perſon of the king, yet he never preached it; yet becauſe he had written it with an intention to preach it, he was brought upon this point and condemned to die. But this book is in print; it is againſt all magiſtrates, and particularly againſt the king our ſovereign, and his bleſſed conſort. And yet, my lords, it pleaſeth his majeſty to let Mr. *Prynne* have his trial here. I will not trouble your lordſhips with any more parts of the book: Mr. Attorney noted unto your lordſhips, that you ſhould ſee how neceſſary it was, that Mr. *Prynne* ſhould be clean cut off, as one that hath a long time endeavoured to move the people to a diſobedience againſt the king, &c. ſo I ſay with Mr. Attorney, it is high time that Mr. *Prynne* may be cut off, ſo far as may go with the cenſure of this Court. My lords, Mr. *Prynne* is better dealt withal, than he would have princes dealt with; he hath had very fair trials.

For his defence, I took notice of it likewiſe: I do remember that all thoſe gentlemen, that were employed and aſſigned as counſel for his defence, every one of them began to crave mercy of the Court; yet they came with a defence and juſtification, ſo far as their cauſe would bear. Mr. *Holbourn* ſaid, "That for players they were rogues by the ſtatute:" yet Mr. Attorney ſaid, "They are not rogues by the ſtatute unleſs they wander," &c. My lords, he ſaid, his intention was againſt public and common plays; yet ſeek all his book through, and you ſhall find it is againſt plays in princes palaces. His intention now muſt be underſtood by his book, and by his words; and that which he doth apply of any author is his own. And I think his defence did aggravate

gravate his offence. As to his defence againſt the ladies, he ſaith, he ſpeaketh it relatively, and not poſitively; yet he ſaith, "Our *Engliſh* ladies are ſo and ſo whoriſh," &c. And for that part of his book, wherein he condemns murder, Mr. *Prynne* will have murder unlawful; but execution of princes is not murder, and therefore that is a lawful act. Mr. Attorney ſaid well, the end of this man and *John Mariana*,[a] &c. they are all one, they all cry malice againſt princes.

I ſhall humbly crave pardon, and diſcharge my conſcience, and ſhall let your lordſhips ſee, how I underſtand the ſenſe, and that ſo I am to judge; and I conceive it to be as your lordſhips ſee, that the malice of this book is againſt king and ſtate: and, my lords, with this I ſentence Mr. *Prynne*.

I do in the firſt place begin cenſure with his book; I condemn it to be burnt in the moſt public manner that can be. The manner in other countries is, (where ſuch books are) to be burnt by the hangman, though not uſed in *England*, (yet I wiſh it may, in reſpect of the ſtrangeneſs and heinouſneſs of the matter contained in it) to have a ſtrange manner of burning; therefore I ſhall deſire it may be ſo burnt by the hand of the hangman.

If it may agree with the Court, I do adjudge Mr. *Prynne* to be put from the bar, and to be for ever incapable of his profeſſion. I do adjudge him, my lords, that the ſociety of *Lincolns-Inn* do put him out of the ſociety; and becauſe he had his offſpring from *Oxford* (now, with a low voice, ſaid the biſhop of *Canterbury*, I am ſorry that *Oxford* bred ſuch an evil member) there to be degraded. And I do condemn Mr. *Prynne* to ſtand in the pillory in two places, in *Weſtminſter* and *Cheapſide*; and that he ſhall loſe both his ears, one in each place; and with a paper on his head, declaring how foul an offence it is, viz. "That it is for an infamous libel againſt both their majeſties, ſtate, and government." And laſtly (nay not laſtly) I do condemn him in 5000l. fine to the king; and laſtly, perpetual impriſonment.

There are other defendants, *Thomas Buckner*, whom I conceive to be the chaplain charged with the licenſing the book. I obſerve, that Mr. Attorney hath little or nothing proſecuted againſt him. It is ſaid, he did combine with the writer and ſtationer for this infamous libel. It doth appear, that he did licenſe it, or at leaſt ſixty-four pages thereof; I think it be alſo true, that Mr. *Buckner* did ſee the book after it was printed. It is ſaid, for his excuſe, that Mr. *Buckner* was cozened and ſurprized by Mr. *Prynne* and *Sparkes*; but it is

[a] A jeſuit.

is plain he licenſed it, or at leaſt ſixty-four pages: therefore I ſhall judge according to the proof, as it is the uſual cuſtom of this court. I muſt judge Mr. *Buckner* to be worthy of a very ſharp ſentence, for certainly there is a very great inconvenience fallen upon the ſtate, for want of due examination: to what purpoſe is there an examination of books, if there ſhall be a connivance and winking at the party that doth it; I ſhall think Mr. *Buckner* not only worthy of a ſevere reprehenſion, but I ſhall cenſure him firſt to have impriſonment according to the courſe of the Court, and 50l. fine to the king.

Now, my lords, the next is *Michael Sparkes*, and he is the third; and he is the printer of the book, and binder, and publiſher thereof. In his defence he hath ſhewed your lordſhips a piece of the book licenſed by Mr. *Buckner*, and ſaith, it was all licenſed, but that he proves not; but that it was entered in the *Stationer's-Hall*, that he proves. But I do find, that he perſuaded men to buy this book after it was prohibited; and before it was prohibited he perſuaded men to buy it, ſaying, It was an excellent book, and it would be called in, and then ſell well. I do fine *Sparkes* 500l. to the king, and to ſtand in the pillory, without touching of his ears, with a paper on his head to declare his offence, and it is moſt neceſſary in theſe times; and for the pillory to be in *Paul's Church-Yard*. (It is a conſecrated place, ſaith the archbiſhop of *Canterbury*.) I cry your grace's mercy (ſaid my Lord *Cottington*) then let it be in *Cheapſide*. For the other three, I find that Mr. Attorney doth not proſecute them; therefore, my lords, I do not cenſure them.

The next in courſe that ſpoke after the Lord *Cottington*, was the Lord Chief Juſtice *Richardſon*.

My Lords,

Since I have had the honour to attend this Court, writing and printing of books have been exceedingly found fault withal, and have received a ſharp cenſure, and it doth grow every day worſe and worſe; every man taketh upon him to underſtand what he conceiveth, and thinks he is nobody except he be in print. We are troubled here with a book, a monſter, (*Monſtrum Horrendum, Informe, Ingens!*) It hath been a queſtion who is the author of this book: ſurely I am ſatisfied in my conſcience he is the author of it: but truly, give me leave, I do not think Mr. *Prynne* is the only actor in this book, but that there were many heads and hands therein beſides himſelf. I would to God in heaven, the devil, and

all elſe that had their heads and hands therein beſides Mr. *Prynne*, were, &c. for I think they are all ill-willers to the ſtate, and deſerve ſevere puniſhment as well as Mr. *Prynne* doth. This book is the ſubject of this day's work, and it is annexed, by Mr. Attorney, to the very information itſelf.

For the book, I do hold it a moſt ſcandalous, infamous libel to the king's majeſty, a moſt pious and religious king; to the queen's majeſty, a moſt excellent and gracious queen; ſuch a one as this kingdom never enjoyed the like, and I think the earth never had a better. It is ſcandalous to all the honourable lords, and the kingdom itſelf, and to all ſorts of people. I ſay, eye never ſaw, nor ear ever heard, of ſuch a ſcandalous and ſeditious thing as this miſ-ſhapen monſter is. How ſcandalous a thing it is, hath appeared already to your lordſhips, by the king and queen's counſel againſt Mr. *Prynne;* I will not for my part repeat.

Yet give me leave to read a word or two, where he cometh to tell your lordſhips of the reaſons why he wrote this book: becauſe he ſaw the number of the plays, play-books, play-haunters, and play-houſes ſo exceedingly increaſed, there being above "forty thouſand play-books, being now more vendible than the choiceſt ſermons." What ſaith he in the Epiſtle Dedicatory, ſpeaking of play-books? "They are ſo big a price, and are printed on far better paper than moſt octavo and quarto bibles, which hardly find ſo good vent as they; and then come in ſuch abundance, that they exceed all number, and it is a year's time to peruſe them over, they are ſo multiplied:" and then he putteth in the margin, "*Ben Jonſon*, &c. printed in better paper than moſt bibles. Now if this be not a tax upon the kingdom, to print theſe books on better paper than the bible itſelf; for my part I leave it to your lordſhips." This monſter, this huge miſ-ſhapen monſter, I ſay it is nothing but lyes, and venom againſt all ſorts of people. It is a ſtrange thing what this man taketh upon him: he is not like thoſe powder-traitors, they would have blown up all at once; this throweth all down at once to hell together, and delivereth them over to Satan. I beſeech your lordſhips to give me leave: "Stage players, &c. (ſaith he) none are gainers and honoured by them but the devil and hell; and when they have taken their wills in luſt here, their ſouls go to eternal torment hereafter." And this muſt be the end of this monſter's horrible ſentence. He ſaith "So many that are in play-houſes, are ſo many unclean ſpirits; and that play-hunters are little better than incarnate deviis." He doth not only condemn all play-writers, but protectors of them, and all beholding

of them; and dancing at plays, they are all damned, and that no leſs than to hell. I beſeech your lordſhips to give me leave but in a word to read unto you what he writes of dancing, &c. "It is the devil's profeſſion; and he that entereth into a dance, entereth into a deviliſh profeſſion; and ſo many paces in a dance, ſo many paces to hell:" this is that which he conceiveth of dancing. "The woman that ſingeth in the dance, is the prioreſs of the devil, and thoſe that anſwer are clerks, and the beholders are the pariſhioners, and the muſick are bells, and the fidlers are the minſtrels of the devil." I ſaid it was a ſeditious libel; this point of ſedition is the only thing that troubles me, and it is that which I ſhall offer to your lordſhips: for I do know it, the good opinion, heart, will and affections of the king's people and ſubjects are the king's great treaſure. Now if this be ſo, then for any man cunningly to undermine theſe things, to take away the hearts of the ſubjects from the king, and to bring the king into ill opinion among his people, this is a moſt damned offence; and if I were in my proper place, and Mr. *Prynne* brought before me, I ſhould go another way to work. I proteſt unto your lordſhips, it maketh my heart to ſwell, and my blood in my veins to boil (ſo cold as I am) to ſee this or any thing attempted which may endanger my gracious ſovereign: it is to me the greateſt comfort in this world to behold his proſperity.

Much hath been ſpoken concerning theſe things, and ſomething by my lord *Cottington* before me; but good my lords, give me leave to remember you one or two paſſages, not yet ſpoken of. He writeth thus: "That *Nero*'s acting and frequenting plays, was the chiefeſt cauſe that ſtirred up others to conſpire his death." Would any man think, that his acting and frequenting of plays was the chiefeſt occaſion?

He writeth in another place worſe than this. Fol. 464. "*Trebellius Pollio* relates, that *Martian*, *Heraclius*, and *Claudius*, three worthy *Romans*, conſpired together to murder *Gallienus* the emperor, (a man much beſotted, and taken up with plays, to which he likewiſe drew the magiſtrates and people by his lewd examples) as *Flavius* and others conſpired *Nero*'s murder for the ſelf-ſame cauſe, &c." Now, my lords, that they ſhould be called three worthy perſons that do conſpire an emperor's death, (though a wicked emperor) it is no chriſtian expreſſion.

If ſubjects have an ill prince, marry what is the remedy? they muſt pray to God to forgive him, and not ſay they are worthy ſubjects that do kill him: if they were worthy acts,

Mr.

Mr. *Prynne*, I can tell what you are, (Mr. *Prynne* ſtanding during the cenſure behind the lord chief Juſtice *Richardſon*, and archbiſhop *Neal*) No man will conſpire to murder a king that can be a worthy actor; for the very thought of it is high treaſon. He ſpeaketh of theſe three, that they were three worthy *Romans* that did conſpire to murder *Nero*. This is moſt horrid, and here can be no manner of expoſition, but in the worſt ſenſe: for his excuſe, he had made none at all, only it was not his intention.

Good Mr. *Prynne*, you are a lawyer. Intention! I know where the word ſtandeth equal, as that you may take the intention this way, or that way, with the right-hand or left-hand, there in that caſe you may ſpeak the intention: but where the words are plain and poſitive, as in your books, here is no help of intention in the world: your words are plain and clear, therefore you can never make any defence at all out of that. Not to hold your lordſhip's any longer, my lords, it is a moſt wicked, infamous, ſcandalous and ſeditious libel. Mr. *Prynne*, I muſt now come to my ſentence, though I am very ſorry, for I have known you long, yet now I muſt utterly forſake you; for I find that you have forſaken God, and his religion, and your allegiance, obedience, and honour, which you owe to both their excellent majeſties, the rule of charity to all noble ladies, and perſons in the kingdom, and forſaken all goodneſs. Therefore Mr. *Prynne*, I ſhall proceed to my cenſure, wherein I agree with my lord *Cottington*, as he began very well: Firſt, for the burning of the book in as diſgraceful a manner as may be, whether in *Cheapſide* or *Paul's Church-yard*; for though *Paul's Church-yard* be a conſecrated place, yet heretical books have been burnt in that place. And becauſe Mr. *Prynne* is of *Lincoln's-Inn*, and that his profeſſion may not ſuſtain diſgrace by his puniſhment, I do think it fit, with my lord *Cottington*, that he be put from the bar, and degraded in the univerſity; and I leave to my lords, the lord biſhops, to ſee that done; and for the pillory, I hold it juſt and equal, though there were no ſtatute for it. In the caſe of a high crime it may be done by the diſcretion of the Court, ſo I do agree to that too. I fine him 5000*l.* and I know he is as well able to pay 5000*l.* as one half of 1000*l.* and perpetual impriſonment I do think fit for him, and to be reſtrained from writing, neither to have pen, ink, nor paper; yet let him have ſome pretty prayer-book, to pray to God to forgive him his ſins; but to write, in good faith I would never have him: For, Mr. *Prynne*, I do judge you by your book to be an inſolent ſpirit, and one that did think by this book to have got

got the name of a reformer, to ſet up the Puritan or Separatiſt faction. I would not have Mr. *Prynne* go without a recognition of offence to the king and queen's majeſty. I agree to the ſentence on *Buckner* and *Sparkes*.

Secretary Cook. By this vaſt book of Mr. *Prynne*'s, it appeareth he hath read more than he hath ſtudied, and ſtudied more than he hath conſidered; whereas if he hath read but one ſentence of *Solomon*, it had ſaved him from the danger he is now like to fall into. The preacher ſaith, "Be not over juſt, nor make thy ſelf over-wiſe, for why wilt thou deſtroy thyſelf?" My lords it is a ſentence requireth much ſtudy and conſideration. It is moſt certain, that righteouſneſs and wiſdom are ſuch virtues, as they help forward juſtice; but when wiſdom is mixed with a man's own humours, as for the moſt part it is with fleſh and blood, there is danger of ſtraining it too far, and that will tend to the deſtruction of him and others. Examples are too pregnant of this, and he may take it from a good author, even from Chriſt himſelf. When his apoſtles, out of zeal to their maſter, would have called for fire from heaven againſt the *Samaritans* that refuſed to entertain him, the anſwer was "You know not of what ſpirit you are." I would Mr. *Prynne* would have conſidered this.

There is a good ſpirit that is meek, tempered with modeſty and humility, with mildneſs and with equity; and ſuch a ſpirit is always tender, not to deſtroy, root up, overthrow, but to bind, repair and preſerve. But there is another fiery ſpirit, which is always caſting of fire, nothing but damnation and deſtruction; certainly ſuch a ſpirit ever tends to his own confuſion. And if this be well obſerved, every man ſhall find it true, that ſuch a ſpirit ever cometh before deſtruction. I wiſh Mr. *Prynne* were not an ill example of this. Certainly, my lords, vice and corruption ought not only to be reprehended, but to be puniſhed ſeverely, and that ſharply too where it is; but Mr. *Prynne* ſhould have conſidered, every man is not a fit reprehender. He had no invitation, nor office, nor intereſt to employ a talent which doth not belong unto him. If magiſtrates and princes ſhould inveigh againſt all things, tolerate nothing, we muſt live no longer among men; and certainly, if we will be thought to live with them that are wholly virtuous, we muſt go out of the world; we have a good author for this. But, my lords, a toleration muſt be uſed, and that Mr. *Prynne* would have found, if he had conſidered his own body: ſhall a man upon every ſlight diſtemper and diſorder in his body take phyſick? or ſhall ill humours be purged 'till he purge all out? certainly

certainly he will purge ſpirit, life and all away with it. And as it is in the natural body ſo it is in the politick, there muſt be a toleration and connivance; it cannot be governed without it, and we have a warrant for it. Did not Chriſt himſelf forbid the cutting out of the tares, leſt they ſhould pluck corn, and deſtroy that too? I think, if Mr. *Prynne* ſhould have been aſked the queſtion that *Naaman* did the prophet, he would not at all have bid "go away in peace," he would have threatened hell and deſtruction. There is a chriſtian wiſdom, and there muſt be a toleration in all ſtates. And certainly the faults that have been tolerated in all times were greater than modeſt plays, or modeſt dancing. It is not my intention, neither do I think it is the intention of any of your lordſhips, to apologize for ſtage-plays, much leſs for the abuſe of them; I wiſh, and ſo I think doth every good man, that the abuſe of them were reſtrained; but, my lords, not by railing, curſing, damning, inveighing, &c. not only againſt the faults and players themſelves, but againſt all ſpectators, and thoſe that come to them, and that of all degrees, and with ſuch bitterneſs and acrimony, that in all the authors alledged, which are infinite, there is not to be found an example. My lords, I am very ſorry he hath ſo carried himſelf, that a man may juſtly fear he is the *Timon* that hath a quarrel againſt mankind. But I love not much to aggravate offences, which of themſelves are heavy enough.

He calleth his book 'Hiſtriomaſtix;' but therein he ſheweth himſelf like unto *Ajax Anthropomaſtix*, as the *Grecians* called him, ſcourge of all mankind, that is, the whipper and the whip. I cannot but concur with the cenſure already begun by my lord *Cottington*, given againſt Mr. *Prynne*, *Buckner* and *Sparks*.

Afterwards the earl of *Dorſet* ſpake to this effect:

Such ſwarms of murmurers as this day diſcloſe themſelves, are they not fearful ſymptoms of this ſick and diſeaſed time? Ought we not rather with more juſtice and fear apprehend thoſe heavy judgments which this minor prophet, prophet *Prynne*, hath denounced againſt this land, for tolerating indifferent things, to fall upon us for ſuffering them, like thoſe mutineers againſt *Moſes* and *Aaron*, as not fit to breathe? My lords, it is high time to make a luſtration to purge the air. And when will juſtice ever bring a more fit oblation than this *Achan*? *Adam*, in the beginning, put names on creatures correſpondent to their natures;

tures: the title he hath given this book is *Hiſtriomaſtix*, or rather, as Mr. Secretary *Cook* obſerved, *Anthropomaſtix*; but that comes not home, it deſerves a far higher title: *Damnation*, in plain *Engliſh*, of prince, prelacy, peers and people. Never did Pope *in Cathedra*, aſſiſted with the ſpirit of infallibility, more poſitively and more preremptorily condemn hereticks and hereſy, than this doth mankind. Leſt any partial auditor may think me tranſported with paſſion, to judge of the baſe liveries he beſtoweth upon court and courtiers, I ſhall do that which a judge ought to do, viz. aſſiſt the priſoner at the bar. Give me leave to remember what Mr. Attorney let fall the other day. I will take hold of it for the gentleman's advantage, that this gentleman had no miſſion: if he had had a miſſion, it would have qualified the offence. Our bleſſed Saviour, when he converſed in this world, choſe apoſtles, whom he ſent after into the world, *Ite, prædicate*, &c. to ſhew the way of ſalvation to mankind. Faith, hope, and charity, were the ſteps of this *Jacob*'s ladder to aſcend heaven by. The Devil, who hates every man upon earth, played the divine, cited books, wrought miracles; and he will have his diſciples too, as he had his confeſſors and martyrs. My lords, this contempt, diſloyalty, and deſpair, are the ropes which this emiſſary lets down to his great maſter's kingdom for a general ſervice. My lords, as the tenor of their commiſſion was different, ſo are the ways: theſe holy men advanced their cauſe in former times by meekneſs, humility, patience to bear with the weakneſs and infirmities of their bretheren; they taught obedience to magiſtracy, even for conſcience-ſake; they divided not their eſtates into factions; they detracted from none, they ſought the ſalvation of men's ſouls, and guided their bodies and affections anſwerably: they gave to *Cæſar* the things that were *Cæſar*'s; if princes were bad, they prayed for them, if good, they praiſed God for them; however, they bore with them: this was the doctrine of the primitive church, and this they did. I appeal to my lords that have read this book, if Mr. *Prynne* has not with breach of faith, diſcharged his great maſter's end. My lords, when God had made all his works, he looked upon them and ſaw that they were good. This gentleman, the Devil having put ſpectacles on his noſe, ſays, that all is bad: no recreation, vocation, no condition good; neither ſex, magiſtrate, ordinance, cuſtom, Divine and human, things animate, inanimate, all, my lords, wrapt up *in maſſa damnata*, all in the ditch of deſtruction. Here, my lords, we may obſerve the great prudence of this prince of darkneſs,

neſs, a ſoul ſo fraught of malice, ſo void of humanity, that it gorgeth out all the filth, impiety and iniquity that the diſcontent of this age doth contract againſt the church and ſtate. But it may be ſome follower of his will ſay, it was the pride and wickedneſs of the times that prompted him to this work, and ſet his zeal, through tenderneſs of conſcience, to write this book. My lords, you may know an unclean bird by his feathers; let him be unplumed, unmaſked, pull off the deceitful vizard, and ſee how he appeareth: this brittle conſcience brother, that perhaps ſtarts at the ſight of the corner-cap, ſweats at the ſurplice, ſwoons at the ſign of the croſs, and will rather die than put on woman's apparel to ſave his life; yet he is ſo zealous for the advancement of his *Babel*, that he invents legions, coins new ſtatutes, corrupts, miſapplies texts with falſe interpretations, diſhonours all men, defames all women, equivocates, lyes; and yet this man is a holy man, a pillar of the church. Do you, Mr. *Prynne*, find fault with the court and courtiers habit, ſilk and ſattin divines? I may ſay of you, you are all purple within, all pride, malice and all diſloyalty; you are like a tumbler, who is commonly ſquint-eyed, you look one way, and run another way: though you ſeemed by the title of your book to ſcourge ſtage-players, yet it was to make people believe, that there was an apoſtacy in the magiſtrates. But, my lords, admit all this to be venial and pardonable, this pigmy groweth a giant, and invades the Gods themſelves; where we enjoy this felicity under a gracious prince with ſo much advantage, as to have the light of the goſpel, whilſt others are kept in darkneſs, the happineſs of the recreations to the health of the body, the bleſſed government we now have: when did ever church ſo flouriſh, and ſtate better proſper? and ſince the plagues happened, none have been ſent among us ſuch as this caterpillar is: what vein hath opened his anger? or who hath let out his fury? when did ever man ſee ſuch a *Quietus eſt* as in theſe days? yet in this golden age is there not a *Shimei* amongſt us, that curſed the anointed of the Lord? ſo puffed with pride, nor can the beams of the ſun thaw his frozen heart, and this man appeareth yet. And now, my lords, pardon me, as he hath wounded his majeſty in his head, power and government, and her majeſty, his majeſty's dear conſort, our royal queen, and gracious miſtreſs; I can ſpare him no longer, I am at his heart. *Oh! quantum!* &c. If any caſt infamous aſperſions and cenſures on our queen and her innocency, ſilence would prove impiety rather than ingratitude in me, that do daily contemplate her virtues; I will praiſe her for that which

which is her own, ſhe drinks at the ſpring-head, whilſt others take up at the ſtream. I ſhall not alter the great truth that hath been ſaid, with a heart as full of devotion, as a tongue of eloquence, the other day, as it came to his part, (meaning Sir *John Finch.*) My lords, her own example to all virtues, the candor of her life, is a more powerful motive than all precepts, than the ſevereſt laws; no hand of fortune nor of power can hurt her; her heart is full of honour, her ſoul of chaſtity; majeſty, mildneſs and meekneſs are ſo married together, and ſo impaled in her, that where the one begetteth admiration, the other love; her ſoul of that excellent temper, ſo harmoniouſly compoſed, her zeal in the ways of God unparalleled: her affections to her Lord ſo great, if ſhe offend him, it is no ſun-ſet in her anger; in all her actions and affections ſo elective and judicious, and a woman ſo conſtant for the redemption of all her ſex from all imputation, which men (I know not how juſtly) ſometimes lay on them; a princeſs, for the ſweetneſs of her diſpoſition, and for compaſſion, always relieving ſome oppreſſed ſoul, or rewarding ſome deſerving ſubject: were all ſuch ſaints as ſhe, I think the *Roman* church were not to be condemned: on my conſcience ſhe troubleth the ghoſtly father with nothing, but that ſhe hath nothing to trouble him withal. And ſo when I have ſaid all in her praiſe, I can never ſay enough of her excellency; in the relation thereof an orator cannot flatter, nor poet lye: yet is there not *Doeg* among us, notwithſtanding all the tergiverſations his counſel hath uſed at the bar? I can better prove, that he meant the king and queen by that infamous *Nero*, &c. than he proves players go to hell: but Mr. *Prynne*, your iniquity is full, it runs over, and judgment is come; it is not Mr. Attorney that calls for judgment againſt you, but it is all mankind, they are the parties grieved, and they call for judgment.

(1.) Mr. *Prynne*, I do declare you to be a ſchiſm-maker in the church, a ſedition-ſower in the common-wealth, a wolf in ſheep's cloathing; in a word *omnium malorum nequiſſimus.* I ſhall fine him ten thouſand pounds, which is more than he is worth, yet leſs than he deſerveth; I will not ſet him at liberty no more than a plagued man or a mad dog, who though he cannot bite, he will foam; he is ſo far from being a ſociable ſoul, that he is not a rational ſoul; he is fit to live in dens with ſuch beaſts of prey, as wolves and tygers, like himſelf: therefore I do condemn him to perpetual impriſonment, as thoſe monſters that are no longer fit to live among men, nor to ſee light. Now for corporal puniſhment, my lords, whether I ſhould burn him in the fore-

head

head or ſlit him in the noſe; for I find that it is confeſſed of all that Doctor *Leighton*'s[a] offence was leſs than Mr. *Prynne*'s, then why ſhould Mr. *Prynne* have a leſs puniſhment? He that was guilty of murder was marked in a place where he might be ſeen, as *Cain* was. I ſhould be loth he ſhould eſcape with his ears, for he may get a perriwig, which he now ſo much inveighs againſt, and ſo hide them, or force his conſcience to make uſe of his unlovely lovelocks on both ſides: therefore I would have him branded in the forehead, ſlit in the noſe, and his ears cropt too. My lords, I now come to this ordure, I can give no better term to it, to burn it, as it is common in other countries, or otherwiſe we ſhall bury Mr. *Prynne*, and ſuffer his ghoſt to walk: I ſhall therefore concur to the burning of the book; but let there be a proclamation made, that whoſoever ſhall keep any of the books in his hands, and not bring them to ſome publick magiſtrates to be burnt in the fire, let them fall under the ſentence of this Court: for if they fell into wiſe men's hands, or good men's hands, there were no fear; but if among the common ſort, and into weak men's hands, then tenderneſs of conſcience will work ſomething. Let this ſentence be recorded, and let it be ſent to the library of *Sion*, (meaning a college in *London*) whither a woman, by her will, will allow Mr. *Prynne*'s works to be ſent.

(2.) For Mr. *Buckner*, I believe that he had no intention at all this work ſhould come abroad; he is ſaid to be a conformable man to the church of *England*: I ſhall hardly cenſure him, he deſerveth admonition.

(3.) For *Sparks*, I concur in all things: the feodary had his office taken away from him by this Court; I ſee therefore no reaſon but that he may be barred from printing and ſelling of books, and kept wholly to binding of books.

The ſentence againſt *Prynne* was executed the ſeventh and tenth day of *May* following. *State Trials*, Vol. I. 418.

[a] See ante, p. 219.

The

The TRIAL of JOHN JAMES, at the *King's Bench*, for High-Treaſon, *Nov.* 14, 1662. Mich. 14 *Car.* II. Wrote by his Friends.

1. THE Indictment charged him with compaſſing and imagining the death of the king.

2. With endeavouring to levy war againſt the king.

3. With endeavouring a change of the government. And in this his compaſſing, imagining, and contriving the king's death, he had maliciouſly, traitorouſly, and by inſtigation of the devil, not having the fear of God before his eyes, declared theſe words: (1.) That the king was a bloody tyrant, a blood-ſucker, and blood-thirſty man, and his nobles the ſame. (2). That the king and his nobles had ſhed the blood of the ſaints at *Charing-croſs*, and the blood of the covenanters in *Scotland*. (3.) That the king was brought in to this end, to fill up the meaſure of his iniquity; and that the king's cup of iniquity had filled more within this laſt year, than in many years before. (4.) That he did bemoan that they had not improved their opportunity when they had power in their hands; and that he did ſay it would not be long before they had power again, and then they would improve it better; and that he did bewail the apoſtacy of the people of God, and ſay, They had not fought the Lord's battles thoroughly; but when the Lord ſhould give power to them again, and give his work into their hands, they would do it better. (5). That the death and deſtruction of the king drew very near.

The indictment being read, the clerk called upon *John James* to anſwer to his charge, and plead guilty, or not guilty.

John James deſired, before they did proceed, that he might have a copy of his charge, and time to conſider of it.

The Lord Chief Juſtice anſwered, That a copy of the charge was not allowed in caſes of high treaſon; [a] and he told

[a] This is ſince altered by ſtatute 7 *Anne*, c. 21. which enacts that all perſons indicted for high treaſon, or miſpriſion thereof, ſhall have not only a copy of the indictment, but a liſt of all the witneſſes to be produced, and of the jurors impannelled, with their profeſſions and places of abode, delivered to them ten days before the trial, and in the preſence of two witneſſes:

told him he must plead guilty, or not guilty, or else a worse thing would follow.

John James answered, he humbly conceived it was his privilege as an Englishman; and till he had that, he was not free to plead one way or other. He alledged that Chief Justice *Coke* had declared it good law; and that Judge *Heath* had declared it also good law; and that he did at *Oxford* give *John Lilburne* a copy of his charge, being arraigned there for high treason.

Then one of the king's counsel told him, That the law would not grant him a copy of his charge in case of felony, much less in case of high treason; and told him, If he would not plead, they would proceed against him as a person contemning the Court, and look upon him a mute.

John James made answer, Seeing he was over-ruled, he pleaded Not guilty, neither in form nor matter.

The Clerk asked him how he would be tried?

He answered, By the law of God. [At which the lawyers gave a great hiss.]

And it was answered thus, or to this effect; "It was not a place or time to talk of the laws of God." But *John James* was willing to urge it again, That seeing the judge did sit there as judge of the law, and of God's law, as they thought, it was meet they should give him liberty to appeal to God's law.

Whereupon the judge told him he must proceed according to their law, or else a worse thing would follow; and say, "By God and the country."

John James answered, He was ignorant of their law, and knew not what snare there might be in it, never having been at any bar before; and therefore desired him he would open the terms, what they meant by God, and what they meant by the country.

The judge answered, God forbid but he should open the terms:

nesses; the better to prepare him to make his defence and his challenges or exceptions to the jury: in prosecutions for treason the prisoner has a right to challenge or except to the amount of thirty-five jurymen peremptorily, without shewing any cause. In felonies he can only challenge twenty-one peremptorily. But if there be sufficient cause there are no limits to the exceptions. If the sheriff who impannelled the jury be partial, or under the direction of either party, the whole pannel may be challenged: the causes of exception to particular individuals, or what are styled challenges to the polls are as follow: 1. If a lord of parliament be impannelled, he may be challenged by either party, or he may challenge himself. 2. An alien may be challenged. 3. One suspected of partiality. 4. One convicted of a crime that affects the credit, as treason, perjury, felony, &c.

terms: by God (ſays he) is meant your firſt demand, to wit, the law of God.

John James aſked him, Why then his firſt demand was not granted?

The judge ſaid, God forbid but that you ſhould be ſo tried; but you muſt uſe the form of the Court.

John James ſaid, If it were ſo, he was ſatisfied.

And by the country, (ſaith the judge) twelve *Middleſex* men, men of truth, that would judge impartially between the king and him.

John James ſaid, If that be the meaning, he put himſelf upon the trial of God and the country.

Serjeant Keeling opened the charge.

Sir *J. Palmer* the Attorney General, followed. Firſt, He ſpake of the antiquity of monarchy, and did fully aſſert the preſent government. Then, by way of reflection, he reviewed the twenty years trouble that had paſſed over our heads in theſe nations; and that the veſſel of this commonwealth had been beaten and blown upon the waves and billows of a tempeſtuous raging ſea, being almoſt broken to pieces, and like utterly to be loſt, unleſs God by a miraculous providence had reſtored his majeſty *Charles* the Second to the crown and dignity; for which (he ſaid) ever bleſſed be his name. Then he obſerved that the beginning of our ſorrows was by the ſeditious preaching of ſome diſcontented miniſters in this nation, and about this city. Then he told them how much care the law had taken for the preſervation of his majeſty's perſon and government; and that it was as much treaſon in the heart, as in the act, *Mens rea facit reum*. Then he did deſcant upon the words of the indictment, and opened them, and told the jury, that according to the law of *England* they were treaſon, for which he ought to die: and then ſat down.

The witneſſes were called.

John Tipler depoſed, that being in a yard adjoining the meeting-houſe, he did, through the window, ſee the priſoner *John James* in the pulpit, and heard him ſpeak the words laid in the indictment; adding, that he mightily applauded *Oliver Cromwel*, ſaying, that every finger of his was a champion: and that the deponent informing alderman *Chard*, a juſtice of peace, what he had heard, the alderman came and apprehended the priſoner in the pulpit, and took all the men that were at the conventicle, committing ſuch of them as refuſed the oath of allegiance; but ſet the women and the reſt at liberty: and the alderman made oath of his ſeizing the priſoner, &c. as the firſt witneſs had

depoſed. *Oſborne*, another witneſs, depoſed he was within the meeting-houſe, and heard the priſoner ſpeak the words laid in the indictment, or to that effect: and another witneſs depoſed, that, being in *Tipler's* houſe, and hearing a perſon ſpeaking very loud, he went out and heard the ſpeaker ſay, "That the Lord had a great work for his people to do; and that they were the people that muſt do it:" but could not be poſitive that the preacher was the perſon that ſpoke them.

On the other hand, the priſoner produced four witneſſes that were at the ſaid meeting, who depoſed, that the words laid in the indictment, were not ſpoken by the priſoner; but they would not declare who they were ſpoken by.

He produced another witneſs alſo, who depoſed, that *Oſborne* ſaid he was frightened to give evidence againſt the priſoner; but *Oſborne* averred upon his oath, in open Court, that he ſaid no ſuch thing.

The judge now bid the jury take notice what had been ſpoke by the king's witneſſes and his. And then the Court told *John James* that he had free leave to ſpeak for himſelf, as much and as long as he pleaſed, if he had called all his witneſſes; and told him, That when the king's council had concluded, he could ſpeak no more; but now he might ſay as much as he pleaſed. Then he ſpake with much liberty and freedom, the Court and all preſent giving attentention to what he ſaid, which was to this purpoſe:

HE ſaid he had ſomewhat to ſay, firſt, as to the form of the charge, viz. "That he had maliciouſly, wickedly, traiterouſly, and by the inſtigation of the devil, not having the fear of God before his eyes," &c. He told them, That in the fear of God he did deny it; and told them he had not a malicious thought againſt the perſon of the king, but deſired the ſalvation of his ſoul, as of his own; that he had not dealt maliciouſly againſt the king, neither was inſtigated thereto by the devil; and that by the goodneſs of the Lord, what he had done, he had done it in the fear of God. Neither could he be judged, as he told them, as a malicious perſon againſt the king in regard he never had any public employment in the nation, either againſt the king in being, or his father, being a man of no account in the world, having not worn a ſword this eleven years; and therefore deſired they would in their underſtanding clear him from this charge, as a perſon malicious againſt the king. And further he ſaid, He was a perſon that could not be ſuppoſed to have in his eye any thing of advantage in the world in ſo acting againſt the king. And as to the matter of the charge, whereas it runs,

"That

"That I *John James* had compaſſed, imagined, and contrived the death of the king;" *John James* told the Court he did not well underſtand what they meant by "compaſſing the death of the king," as compaſſing and imagining is ordinarily taken: he had not, neither was he capable of endeavouring the king's death, nor the change of the government; being a mean inconſiderable perſon, a man that had lived upon his calling. And as to thoſe particulars laſtly charged upon him, he ſaid he was not guilty of them: he did not ſay "the king was a bloody tyrant, a blood-ſucker, a blood-thirſty man;" that in the fear of the Lord he did utterly deny; neither did he ſay any thing tending thereto. He further ſaid, He did not ſay "the king had ſhed the blood of the ſaints at *Charing-Croſs* this time twelve-month:" he did not ſay, "They, when they had power in their hands, would improve it more thoroughly for God; and that we did not fight the Lord's battles thoroughly." And whereas he was charged for contending for *Cromwel*, and that power, (that God had ſo eminently wiped off from the ſtage) he ſaid he did declare againſt that power, and was averſe to it, and did ſuffer under it in his meaſure; and told them he did not ſtand there as *Cromwel*'s advocate. Then did he endeavour to ſpeak more particularly to the jury, letting them know that in a ſecondary way his life was in their hands; and it was, in the eye of reaſon, in their power to ſave or deſtroy him, and wiſhed them to have a care of ſhedding innocent blood: and told them, Becauſe of innocent blood the land did mourn, to wit, for the blood ſhed in queen *Mary*'s days, and king *Henry* the Eighth's; and if there were any innocent blood ſhed ſince, he deſired no more to be added to it. He told them he did deſire they would act conſcientiouſly, and not to be over-awed by any man. He told them they were his judges in law of matter of fact, and deſired them to be tender of his blood. He ſaid, He ſhould ſay very little more for himſelf, but one word for the Lord, and therefore deſired he might have his fear before him, and although he was the pooreſt and meaneſt for ſuch a work, yet he was called forth, and did declare, "That the Lord Jeſus Chriſt was King of nations, as well as King of ſaints; and that the government of kingdoms did of right belong to him." And he quoted *Rev.* xi. 15. "And the ſeventh angel ſounded, and there were great voices in heaven, ſaying, The kingdoms of this world are become the kingdoms of our Lord, and of his Chriſt, and he ſhall reign for ever and ever."

And when he had ſo ſpoke, the Lord Chief Juſtice *Forſter*

interrupted him, ſaying, "Hold, ſirrah; ſirrah, you think you are in the conventicle in *Whitechapel*, preaching." And thereupon commanded the clerk to read the act of parliament, entituled, "An act for the preſervation of the king's perſon and government:" wherein was expreſſed to this purpoſe, "That whoſoever ſhall contrive or endeavour to levy war againſt the king or government, &c. or endeavour to compaſs or contrive the death of the king, his wound or maim; or that by printing, preaching, writing, or other ſpeaking, endeavour the ſame: then every ſuch perſon or perſons ſhall be looked upon as traitors to the king, and ſhall be proceeded againſt as in the caſe of high-treaſon," &c. Which when the clerk had read,

John James deſired liberty to ſpeak, deſiring the Court to produce a ſtatute that would reach his caſe, for that did not, but the caſe of ſuch as had endeavoured to levy war againſt the king, or had compaſſed or contrived his death or maim: but he had not contrived or compaſſed the death of the king, or the change of the government within or without his dominions; and therefore deſired a ſtatute might be produced that might reach his caſe, for he conceived that was ſhort.

The judge told him it fully reached his caſe.

And one of the king's counſel made anſwer, That it reached him in every caſe.

And another of the counſel ſaid, Treaſon was the firſt conception and the firſt evil thought in the heart; and treaſon was made viſible by preaching, or printing, or ſpeaking, &c. which was a manifeſtation of the things that were in the heart.

This being ſpoken, the judge aſked him if he had any more to ſay for himſelf; and told him, if he did not ſpeak now, the king's counſel would enter upon their plea, and then he muſt ſpeak no more for himſelf.

He told them he had one word to the jury, which he deſired to lay before them: it was a ſcripture written in the 29th of *Iſaiah*, ver. 21. "That make a man an offender for a word, and lay a ſnare for him that reproveth in the gate."

Whereupon the judge told him it was not to be borne; for he did inveigh againſt the parliament.

Though he ſaid, He had not the leaſt thought of the parliament; but he ſpake it to let the jury know, that if he were guilty of thoſe words, there was no law of God to take away a man's life for words.

Hereupon

Hereupon the king's counſel ſpake ſeverally one after another.

Firſt, Serjeant *Glynn* ſtood up, and ſaid, Brother *Maynard*, ſhall we not anſwer ſomething to what the priſoner hath objected? So *Glynn* began.

HE told the jury, That if they proved the words alledged in the indictment ſubſtantially, though it were not adequate thereto in every tittle and *iota*, yet it was ſufficient to ſatisfy their conſciences, and to find the priſoner guilty of high-treaſon.

Firſt, He began with the exception taken unto the firſt witneſs, That he ſtood without the window, and therefore could not eaſily diſcern the viſage and phyſiognomy of the priſoner that was there preaching. He told them he had ſworn expreſly it was the ſame perſon; and that as he came into the yard he was there a preaching, and as he went away to the juſtice of peace he ſaw him: and the juſtice did ſeize the ſame perſon, and find him preaching when he came; and therefore it muſt be him, and no other. And told them, that the witneſs could have no end in diſcovering of it; for if he had kept ſilence, he had conſented, and ſo been guilty of miſpriſion of treaſon.

Then ſaid he, As to the exception taken againſt the fourth witneſs, That he ſaid he ſwore he knew not what, and could not tell what he had ſworn to.

He ſaid, This was no cauſe to reject this evidence; for peradventure he could not well call to mind the ſeveral words that were ſpoken; or peradventure he would not tell them, becauſe he might ſuppoſe that they were ſent to enſnare him in his evidence, that they might make it void.

Then as to the witneſſes that were brought on the part of the priſoner, to teſtify that no ſuch words were ſpoken; he ſaid, As to that he muſt refer it unto the conſciences of the jury. But he ſaid, he conceived it was altogether immaterial: for the queſtion is not, what he did not ſay, but what he did ſay. They ſay that he did not ſay theſe words, but they do not ſay what he did.

Then ſtept up ſerjeant *Maynard*, and ſaid, That as to the evidence of thoſe three perſons, his brother *Glynn* had ſpoken ſo much, and ſo well, that he could add no more, or very little: and urged the ſame things that ſerjeant *Glynn* did. And further ſaid, That the priſoner ſpoke much of his integrity and innocency; I believe (ſaith he) gentlemen of the jury, never was there any offender, or the vileſt miſcreant in the world, that would ever have received the re-

ward of his doings, if his own excuſe and proteſtation might have ſaved him.

Then he ſaid, As for the blood of the ſaints that was ſpilt this time twelvemonth, he ſaid they were ſad ſaints, ſuch ſaints (ſaid he) as would have cut all our throats.

Then *John James* deſired to be heard one word, that that gentleman had untruly alledged againſt him; but the Court refuſed to allow him the liberty.

Then ſtood up Sir *Heneage Finch*, ſolicitor-general.

MY Lord, and you gentlemen of the jury, be it known unto you, and to all that hear me this day, that the priſoner at the bar is not arraigned for his conſcience or religion, but for treaſon and rebellion, for horrid treaſon and rebellion, for ſpurning againſt the meekeſt king in the earth. His majeſty, to the great and inexpreſſible grief of his heart, did not think there was a perſon ſo unworthy left within his dominions, that would have lifted up the heel againſt him, after twenty years rejecting of his majeſty and his royal father: and having alſo conferred his grace upon us, to reduce us to a ſtate of innocency, he could not think there was any gall left in our hearts, or any guile found in our mouths.

He then preſſed his treaſon upon the conſciences of the jury, who, as he told them, would affright their conſciences with his innocency. And told them, how that the puniſhment of this offender might affright the like malefactors for the future: and ſaid, that there were a people, that under the pretence of religion had the liberty of conſcience allowed by the king for a time, till they were better informed; but this man, and thoſe of his mind, are none of thoſe men: but they endeavour not only to deſtroy the monarch, but monarchy itſelf; not only in *England*, but all the world over. This is the principle that they are of, therefore I deſire the jury to take notice what may be their duty upon that account. And that when the priſoner was preaching that pernicious ſermon, he preſſed it with the peril of their ſalvation, and now would affright you upon the account of innocent blood: but you ſhall find, if his blood be rightly and ſwiftly purſued, it may be a means of preventing the ſhedding of the blood of thouſands, for the time to come. And withal did deſire them to conſider further, That the great trouble this nation had undergone for theſe twenty years laſt paſt, ſprung from pulpits, conventicles, and ſeditious preaching; and therefore if theſe cauſes were taken away, it might prevent ſuch evil effects for the future. And ſaid, That as to the

evidence

evidence he had produced, it had been well ſpoke to by the two ſerjeants that ſpoke laſt: and as to that evidence by the women, he ſaid they had no reaſon to tell what was ſaid by *John James*, for thereby they would make themſelves guilty of miſpriſion of treaſon; which is to be puniſhed with perpetual impriſonment, confiſcation of goods, and the loſs of the profits of lands during life.

That is well obſerved, ſaid my lord to the ſolicitor.

Then judge *Forſter* endeavoured further to inform the jury, and to incenſe them againſt his principle, telling them, that he was of the ſame ſpirit with thoſe that did endeavour heretofore to put all the nation in a flame, and to ſet every one againſt each other; and ſaid, No treaſon was comparable to that treaſon that was covered with a pretence of religion.

This being done, and the jury ready to go forth, *John James* deſired the Court to favour him with one word to the jury.

They told him he had had a great deal of liberty, and time to ſpeak; but now he ſhould ſpeak no more.

Then *John James* replied, That if they would not ſuffer him to ſpeak to his jury, they had as good have hanged him at *Bull-ſtake-Alley* gate, before he came there, and not brought him thither to cover over the matter with the pretence of law.

This being ſpoken, the judge gave him a ſore rebuke, and told him he was not to be judge in the caſe.

Then my lord and the judges laid their heads and conferred together, whereupon my lord ſaid thus to the jury, or to this effect; You have heard the evidence, you are to find the matter of fact as it is laid before you, whereof you are the proper judges, and I pray God direct you.

Then the king's counſel and the jury departed from the bar; and at the return of the jury, being about a quarter of an hour, the attorney and ſolicitor-general came back into the Court with them.

Whereupon the crier called them all by name, and the clerk aſked them if they were all agreed, and they anſwered, Yes.

Then the clerk of the crown commanded the priſoner to hold up his hand, and aſked the jury, How ſay you, is *John James*, who hath been arraigned and tried, guilty of the treaſon alledged in the indictment, or not guilty?

And the foreman, which was *Charles Pitfield*, ſaid, Guilty according to the indictment.

Then

Then the attorney-general prayed judgment for the king. To that the Court anſwered, Never the ſame day he is arraigned, but appoint what day the priſoner ſhall be brought, and it ſhall be granted. Then the attorney and ſolicitor conferred together, and the attorney ſaid, On Friday next. Till which time he was remanded to the *King's-Bench* priſon in *Southwark*.

His Wife's Application to the King, after her Huſband was caſt.

IN the interval, betwixt his caſting and condemnation, upon the fourth day of the week in the evening, his wife, by advice of ſome friends, endeavoured to make addreſs to the king, to acquaint him with her huſband's innocency, and the condition of thoſe looſe perſons who had falſely accuſed him; which ſhe put in writing, leſt ſhe might either want an opportunity, or not have courage enough to ſpeak to him. And with ſome difficulty at laſt ſhe met with the king as he came out of the *Park*, going into the gallery; where ſhe preſented him with the paper, which on the back was indorſed, "The humble requeſt of *Elizabeth James*:" acquainting him alſo by word who ſhe was, to whom he held up his finger, and ſaid, "Oh Mr. *James*, he is a ſweet gentleman!" But following him for ſome further anſwer, the door was ſhut againſt her; which was all ſhe could obtain at that time. The next morning ſhe came again to the ſame place, where ſhe had not long been, but the king came out of the gallery to go into the *Park*, whom ſhe followed down the ſtairs, imploring his anſwer to her requeſt, who then replied, "That he was a rogue and ſhould be hanged." One of the lords attending him, aſked her of whom ſhe ſpake; whereunto the king anſwered, "Of *John James*, that rogue: he ſhall be hanged, yea he ſhall be hanged." And ſo ſhe came away, ſatisfied in her conſcience, that what ſhe had done was but her duty,

The Third Day, November 22.

BEING this day brought to the bar, according to the former order, the clerk proceeded according to their manner, and told the Court, that *John James* had been arraigned and tried, &c. and had committed himſelf to God and the country for trial, and by the country was found guilty of the crimes and treaſons alledged againſt him in the indictment. And then it was demanded of *John James*, what he had to ſay for himſelf why ſentence of death ſhould not be

paſſed

paſſed upon him according to the law? To which *John James* anſwered, That he had not much to ſay, only two or three ſcriptures he would leave with them. The firſt ſcripture was *Jer.* xxvi. 14, 15. "As for me, do as ſeemeth good unto you; but know ye for certain, that if ye put me to death, you ſhall ſurely bring innocent blood upon yourſelves, and upon this city, and upon the inhabitants thereof."

The ſecond ſcripture was *Pſal.* cxvi. 15. "Precious in the ſight of the Lord is the death of his ſaints." He alſo minded that good word of the Lord, "He that toucheth the Lord's people, toucheth the apple of his eye." He told them he had not more to ſay for himſelf, only one word for the Lord, and ſo he had done: "That Jeſus Chriſt the Son of God was King of *England*, *Scotland*, and *Ireland*, and of all the kingdoms of this world." Which being ſpoken, they ſilenced him, and the Court proceeded to ſentence, and the judge pronounced ſentence according to the law, and ſaid thus:

"*John James*, thou haſt here been indicted, arraigned, and tried as a falſe traitor to his majeſty, his crown and dignity, and haſt put thyſelf upon the trial of God and the country, and the country have found thee guilty; and therefore, *John James*, thou art to be carried from hence to priſon, and from thence to the place of execution, and there to be hanged by the neck, and being yet alive, to be cut down, and thy bowels to be taken out, (a fire being prepared) and to be burnt before thy face; and thy head to be ſevered from thy body, and thy body to be quartered, and thy head and body to be diſpoſed of according to the king's pleaſure."

This being done, *John James* had only time to ſay, "Bleſſed be God; whom man hath condemned, God hath juſtified." He was executed in purſuance of the ſentence, *Nov.* 26.

A LITTLE before his going forth, ſeeing ſome of his friends come in who had particularly deſired to accompany him to the place of execution, he ſaid, "Here come my bride-men," embracing them with much joy. But, ſaid he, "Muſt not the ſacrifice be bound?" one anſwered, "Yea, it muſt be bound with cords:" he rejoicing, ſaid ſo he had heard.

Soon after the keeper came into the room, and calling him down to deliver him to the ſheriff, he told him he was a welcome

a welcome meſſenger, he had waited long for him; and ſo he came with joy after the keeper, from his chamber into the preſs-yard, where hearing the noiſe of the multitude without, ſaid to a friend, "There would be by and-by as many hallelujahs, as ſhoutings of the people without;" and there they bound him about the back with a new cord, and ſo had him into the ſtreet; and being placed upon the ſled, drawn by a team of horſes attended by the ſheriffs men, and a company of foot-ſoldiers, was drawn along to *Tyburn*; the way out of the town being foul, he was drawn through very much ſlapping of the horſes that went beſides him.

Being come to the place of execution, he aſked Mr. *Sterling* the ſheriff, whether he might not have liberty to ſpeak to the people? he told him he might, if he would not ſpeak ſeditiouſly, (or words to that purpoſe.) Then *John James* addreſſed himſelf to ſpeak as followeth.

Firſt of all, that which I have to ſay before I go out of this world, is, to remove that which hath been thrown upon me by way of aſperſion, as if I were a Jeſuit. [a] Here at this place, at this time, are ſome that knew me from childhood, and can clear me in this particular: and therefore I ſhall only ſay this to it, that I am an *Engliſhman*, never was out of the nation in all my life; never had any knowledge of any other tongue, therefore altogether uncapable of ſuch work and employment as Jeſuits are uſually put upon, they being commonly men of great parts and learning, which I am not. I ſhall only ſpeak this in reſpect of my parentage and education; I came of a very mean family; I may truly ſay, as once *Gideon* did, "My family is the leaſt in all *Manaſſeh*, and I am the leaſt in the family:" and in truth I may juſtly ſay, my family, the family that I came of, it was a very mean family, the meaneſt among all the families of the people of the Lord at that day, as I knew of; and for my parents, they were people fearing God, thoſe that durſt not for their lives ſtain their conſciences in reſpect of idolatry and ſuperſtition that was up at that day.

I ſhall not need to ſpeak any more to that, I came not here to boaſt of my parentage; I declare I came of a mean family, only my parents were people fearing God, and did, to their utmoſt, endeavour, what they could to bring me up in the nurture and admonition of the Lord; and I hope my father at his death had not ought to be charged with by way

[a] This vindication was occaſioned by the coming of a courtier, (and as ſome ſaid one of the bed-chamber) two or three nights before he ſuffered, to know if he was not a Jeſuit, and if he had not been beyond the ſeas.

way of blame: and my mother is yet alive, and attained to a good old age, and I truſt ſo ſhe is. But I ſhall not trouble you more about this matter; for I only ſpeak this, to take off that which was caſt upon me, wherein I judged the name of God would have ſuffered, had I not cleared myſelf.

The ſecond thing that I ſhall ſay, is what I am in my principles, what I am in reſpect of my religion and judgment, and I ſhall be brief as to that. I do own the title of a Baptized believer, I do own the ordinances and appointments of Jeſus Chriſt, I do own all the principles in *Heb.* vi. 1, 2. about the doctrine of faith towards God, and repentance from dead works, the doctrine of baptiſm, and laying on of hands, the reſurrection of the dead, and eternal judgment. Theſe are the principles that I deſire to own; and have in ſome weak meaſure been found walking in: I do not only own the principles and doctrines declared in the ſixth of the *Hebrews*, but I do own the commandments of God, the ten commandments, as they are expreſſed in the 20th of *Exodus*. I do here, as before the Lord, teſtify, I durſt not, I durſt not willingly break the leaſt of thoſe commandments to ſave my life; I do declare that the rather, becauſe I would inform perſons that I do own the Lord's Sabbath, the ſeventh day of the week to be the Lord's Sabbath; you know the commandment, "Remember that thou keep holy the ſeventh day." I ſhall forbear to ſpeak any more to that.

Again, further, in reſpect of my principle (as that for which I judge I am here this day to ſuffer) that I do own the kingdom of our Lord Jeſus Chriſt, (to wit) the viſible kingdom of Jeſus Chriſt on earth, and I do deſire to declare it humbly in the fear of the Lord, "That Jeſus Chriſt the Son of God is King of all the nations in the world," according to that in *Rev.* xi. 15. upon the ſounding of the ſeventh trumpet there was a great voice in heaven, "The kingdoms of this world are become the kingdoms of our Lord, and of his Chriſt; and he ſhall reign for ever and ever." There needs no more to be ſaid, though many more ſcriptures might be brought to prove that it is ſo. It cannot be a ſpiritual kingdom, the text cannot be allegorical; for the text ſaith expreſly; "The kingdoms of this world, &c." I ſhall endeavour not to tire you with many words; I do not come here (the Lord knows) to ſow ſedition, I have it not upon my heart, it hath not been my practice, though this be the pretended cauſe of bringing me hither; but the Lord knows, before whom I ſtand, and with whom I ſhall

ſhortly

ſhortly be, that whatever I am accuſed of, as to matter of fact, I am free from it; I deſire you may hear it, and take notice of it, the things charged upon me are notoriouſly falſe, I ſpeak it as my laſt words, the Lord that knows all hearts, and one day will call all men to an account, knows I ſpeak true, both in reſpect of the manner of the thing charged upon me, and in reſpect of the matter, notwithſtanding that ſeveral witneſſes took the boldneſs to ſwear it in Court. I do in the fear of the Lord alſo tell you that I bleſs the Lord I have not the leaſt hard thought of them that ſwore againſt me, I have not the leaſt hard thought upon that account, not the leaſt riſing of the ſpirit againſt either judge, or jury, or witneſſes, or any other, the Lord knows it, but have ſought their pardon upon my bended knees, and I hope further ſhall do it, if God permit. I have one word to the people of God, and that is this; I would intreat you not to think ever the worſe of the ways of God, becauſe you ſee ſuch a poor worm as I brought hither to ſuffer upon that account. Let not the aſſembling of yourſelves together be any way a burthen to you; know that word, "Forſake not the aſſembling of yourſelves together, as the manner of ſome is, but be inſtructing one another ſo much the more as you ſee the day approaching," *Heb.* x. 25. and let not any of the ways of God, any of the ordinances of God, any of the commandments of God be ever the worſe in your eyes, becauſe a poor worm that has profeſſed them, and has in ſome poor meaſure taſted in them of the love of God, is brought hither, do not think the words and the commandments of God are the worſe for that; and I would intreat you that you would ſtick cloſe to them, whatever diſpenſation may be at the door, which no man here knows one or other: but I ſay, whatever the ways and diſpenſations of God may be, though you may expect to ſuffer more and more, yet know that was the way our Lord did go, the captain of our ſalvation was made perfect through ſufferings; and the apoſtles and holy chriſtians of old counted it great joy, they accounted it great joy to be filling up the meaſure of Chriſt's ſufferings that are behind. And now, my dear friends, for Jeſus Chriſt's ſake, be exhorted in the fear of God, not only to ſtick to thoſe ordinances and commandments of God, wherein you are enlightned, but take that good word of God, 1 *Chron.* xxviii. 8. it was *David*'s advice to *Solomon*, the words are, "*Solomon* my ſon, keep and ſeek for all, &c." do not content yourſelves with what you do already know, but endeavour, in the fear of the Lord, to be ſeeking after more. I would

further

further charge every one of the people of the Lord, to have a care of defiling themſelves with any idolatry, with any ſuperſtition, by treading in by-paths that may not ſuit the mind of God, however it may be accepted in the land.

I ſhall not trouble you with much more, only a word to thoſe that have not yet an intereſt in Jeſus Chriſt, that cannot call God, Father, I beſeech ſuch to conſider, it may be that God hath a mind, by the words of a dying man, to do their ſouls good, and I would add a word; I beſeech you conſider, though you may not go the ſame way I go, you do not know how ſoon God may call for you by death; and therefore I ſpeak to them that are young ones in the firſt place, "That they remember their creator in the days of their youth, before the evil day is come," and the days wherein they themſelves ſhall ſay, "they have no pleaſure in them." And to thoſe that are ancient, that have ſpent the greateſt part of their time here, in ſporting in their own luſts, I would only ſay this to them, There is yet a day of grace, "To-day if you will hear his voice." Jeſus Chriſt is held forth in the goſpel freely; he holds forth his blood freely; for the worſt of ſinners are not too old, nor too wicked, nor too great, they are not too unclean for Jeſus Chriſt to pity; and therefore friends, conſider in the fear of the Lord whereabout you are, and how the caſe ſtands with your poor ſouls. I have ſaid what I have to ſay, only I ſhould deſire that I might have liberty to wait upon God, to commit my ſoul and the concernments of each other to the Lord in prayer. Then he addreſſed himſelf to the Lord in prayer.

His prayer being ended, he ſaid he could not ſpeak more, being very much tired, and his body brought very low. The hangman ſaid, "The Lord receive your ſoul." He replied, "I thank you." Then another ſaid, "This is a happy day." He ſaid, "I bleſs the Lord, it is ſo." The other ſaid, "The Lord make your paſſage eaſy." He ſaid, "I truſt he will ſo." One aſked if he had any thing to ſay to the ſheriff? he ſaid, "No, but only to thank him for his civility." Then the hangman having prepared him for his death, drew away the cart, *John James* ſaid aloud, (lifting up his hands) "Father, into thy hands I commit my ſpirit," and ſo finiſhed his courſe.

The ſheriff and hangman were ſo civil to him in his execution, as to ſuffer him to hang till he was dead before he was cut down; the hangman taking out his heart, and burning his members and entrials, returned his head and quarters back to *Newgate*, put in a baſket in a cart, and

from thence were diſpoſed by the king, viz. his quarters to the gates of the city, and his head firſt upon the bridge, but afterwards (by appointment) taken down thence, and put upon a pole in *Whitechapel*, over-againſt the paſſage to the meeting-place, where he and his company were apprehended. *State Trials*, Vol. II. 470.

The TRIAL of JOHN TWYN, Printer, for a Treaſonable Libel, 20th and 22d *February* 1663-4. 15 CHARLES II.

THE indictment charged the priſoner with compaſſing the death of the king: and the overt act, laid as an evidence of it, was, his printing a treaſonable pamphlet, entitled, "A treatiſe of the execution of juſtice, wherein is clearly proved, that the execution of juſtice, and judgment, is as well the peoples as the magiſtrates duty; and if the magiſtrates pervert judgment, the people are bound by the law of God to execute judgment without them, and upon them:" but the treaſonable paſſages laid in the indictment, and taken out of the body of the book, were ſo ſcandalous, that the government did not think fit to print them with the reſt of the trial, which makes it an imperfect piece.

Mr. *North*, Barriſter, opened the charge.

Mr. Serjent *Morton*. May it pleaſe your lordſhips, and you gentlemen that are ſworn of this jury, I am of counſel with the king againſt *John Twyn*, the priſoner at the bar, who ſtands indicted of a moſt horrid and damnable treaſon: it is, "the compaſſing and imagining the death of the king, to deprive him of his crown and royal government, and to alter and change the ancient legal and fundamental government of this kingdom;" which he has endeavoured to do, and did intend to do, by printing a traitorous and ſeditious book, which in itſelf contains as many and as great treaſons, as it was poſſible either for the malice of the devil, or the corrupt and treaſonable thoughts of bloodthirſty men to invent: it contains treaſons againſt the king in

in his royal perſon; againſt his government, both eccleſiaſtical and civil; full of treaſons, (as my lord chief juſtice was pleaſed to obſerve to you) treaſons againſt the queen, ſcandals againſt all manner of profeſſions both in church and kingdom, of magiſtracy and miniſtry. My lord, there are in this indictment thirteen paragraphs of that treaſonable book recited; and each of them contains as many treaſons as there be lines in it. Nay, my lord, this treaſonable book was intended to ſet a flame in this nation, to raiſe and ſtir up rebellion in this kingdom againſt the king and his government. I ſhall obſerve to your Lordſhip the time when it was to be printed; it was in the beginning of *October*: your lordſhip knows, and I do not doubt but the jury have heard, that there was a great and dangerous deſign in this nation, ſet on foot by men of dangerous principles, to imbroil this nation in a new war, for the deſtruction of the king and his government. It was executed in part, as far as time and other circumſtances would give way and leave to the undertakers, (the 12th of *October* laſt;) and, my lord, it was proved upon the execution of a commiſſion of *Oyer* and *Terminer* at *York*, that there was a council here in *London*, that ſat to prepare matter for an univerſal rebellion all *England* over. They ſent their agitators into the *North*, *Weſt*, all parts, to give notice to their party to be ready to riſe at a certain time: ſeveral days were appointed, but it ſeems they could not be ready till that 12th of *October*; for the ſeditious books that were to lead on that deſign, and the libels and declarations could not be printed before that day: and truly that had been printed and publiſhed too, if there had not been great diligence uſed by the king's agents and miniſters, to take them juſt as they were preparing it. This book, gentlemen, doth contain a great deal of ſcandal upon the king's government, diſperſing falſe and baſe rumours, to the prejudice of it. It is a rule in my lord *Coke*, "That the diſperſing of falſe and evil rumours againſt the king and government, and libels upon juſtices of the kingdom, they are the forerunners of rebellion."

We ſhall now go to the proof: we ſhall prove that this priſoner at the bar, to print this book, had two preſſes in one room; that he himſelf did work at one of thoſe preſſes, his ſervants at the other, by his command, and in his preſence: that he did compoſe part of it, print the ſheets, correct the proofs, and reviſe them all in his own houſe, which were corrected and brought back into the work-houſe by himſelf, in ſo ſhort a time, that they could not be carried abroad to correct, ſo that he muſt needs correct them himſelf;

himſelf; that this work was done in the night-time, and it was proper, it was a deed of great darkneſs, and not fit indeed to ſee the light; and it was well it was ſtrangled in the birth, or elſe, for ought I know, we might by this time have been wallowing in our blood. We ſhall make it appear, that this man, when Mr. *L'Eſtrange* came to ſearch his houſe, brake the forms, conveyed away as many of the ſheets as he could from the preſs to other places: yet notwithſtanding, God's providence was ſo great in the thing, that he left there three or four ſheets, which Mr. *L'Eſtrange* then ſeized on, and many more within a little time after: and ſomewhat of the ſame matter remained upon part of a form of letter, which his haſte would not give him leave to break. When he was charged with it by Mr. *L'Eſtrange*, he confeſſed that he had printed ſome ſheets of this ſeditious book; and being demanded by Mr. *L'Eſtrange*, What he thought of it? He told him, He thought "it was mettleſome ſtuff:" he had great joy in it; he confeſſed he had received money for the printing of this; and much other matter, taken upon examination before Mr. Secretary. We ſhall call our witneſſes; I ſhould have obſerved to you, That this man would have done it with all the privacy that could be, and to be done forthwith; there was great haſte of it, about the beginning of *October*, and the deſign in the *North* was on the 12th; ſo that it was clearly intended for that deſign.

The witneſſes produced to prove the priſoner's printing the book, were, firſt, *John Walker*, his apprentice, who depoſed, that he (the witneſs) compoſed (or ſet the preſs for) the firſt four pages of the book, and that his maſter *Twyn*, the priſoner at the bar, delivered him the manuſcript copy: that he (the witneſs) alſo compoſed the title, and part of the ſecond, third, and fourth ſheets; and his maſter, he thought, compoſed the reſt, and corrected the ſheets; and was poſitive, that his maſter worked off ſome of the ſheets.

That they uſually worked at the preſs from two in the morning till five: and that Mr. *L'Eſtrange* came and knocked at the door while they were at work, and the deponent looking out at the window, and telling his maſter, Mr. *L'Eſtrange* was there, his maſter anſwered, He was undone: whereupon he broke the form (diſperſed the letters) by his maſter's direction.

Mr. *L'Eſtrange* depoſed, that, having notice of a preſs that had been at work ſeveral nights in *Cloth-Fair*, he took a printer and a conſtable with him, and went to *Twyn*'s houſe, where he heard them at work; and when he knocked

knocked at the door, they put out the lights, and made him wait a quarter of an hour, before they let him in; but having got a candle, he went up ſtairs, and found a form broken, only one corner ſtanding entire, which the printer that went with him comparing with the corner of a page newly printed, they appeared to be the ſame; and at laſt they found the whole impreſſion, thrown down a pair of back ſtairs: and that *Twyn* told him he had the copy (the manuſcript) of Mrs. *Calvert*'s maid, to whom he alſo delivered the ſheets he had printed; and that ſhe paid him forty ſhillings in part for his work.

Dickenſon, another witneſs, who attended Mr. *L'Eſtrange* to *Twyn*'s houſe, confirmed his teſtimony, as did *Thomas Mabb*, another witneſs.

Wickham the king's meſſenger alſo depoſed, that he attended Mr. *L'Eſtrange* to *Twyn*'s houſe, and that there were two or three hundred ſheets thrown into the next houſe wet, newly come off the preſs; and that when he had the priſoner in cuſtody at his houſe, he owned it was a very bitter thing, and ſaid, it was his unhappy fortune to meet with it: there were ſeveral other witneſſes alſo examined, that corroborated the evidence of the former.

The priſoner made no other defence, than by a flat and poſitive denial of the whole: he ſaid he neither read the book, or heard it read; nor did he ſet his men to work upon it, or know the author, or from whence it came.

Ld *Hyde*. That's impoſſible. I'll tell you: firſt, Your own man, who ſet part, ſwears you did both ſet and print part of this book yourſelf: you gave him the title to ſet. You compoſed one part of the book, whilſt he was compoſing another part. Is it poſſible you could compoſe, and not read a line of it? He tells you further, when the firſt ſheet was printed, he brought it into the kitchen, and laid it down, knew not of any one in the houſe but yourſelf; about an hour, or an hour and half after, you brought it back again corrected, laid it down; and the hand that corrected it was not unlike your hand upon other corrections of books. Pray, brother *Morton*, let the jury have books, and Mr. *Lee* read the indictment, that they may ſee they agree.

Serjeant *Morton*. I obſerved to you there were thirteen treaſonable paragraphs; you ſhall find them marked out in the margin.

Ld *Hyde*. You ſhall ſee there are treaſons with a witneſs: ſee the very title.

Mr. *Lee*. [Reads the title of the indictment.] "A Treatiſe

tiſe of the Execution of Juſtice: wherein is clearly proved, That the execution of judgment and juſtice is as well the peoples as the magiſtrates duty; and if the magiſtrates pervert judgment, the people are bound by the law of God to execute judgment without them, and upon them."

Ld *Hyde*. That you gave to your man to ſet.

Mr. *Lee* reads, "It is one of the ſcarlet ſins of this nation, that the people ſuffered their rulers," &c. The particular paſſages are too impious to be publiſhed, and indeed too foul to be repeated, but in ſubſtance. Thoſe mentioned in the indictment are as follows:

Firſt, The ſupreme magiſtrate is made accountable to the people.

Secondly, The people are rebelliouſly incited to take the management of the government into their own hands.

Thirdly, They are animated to take up arms, not only againſt the perſon of his ſacred majeſty, but likewiſe againſt the royal family.

Fourthly, They are ſtirred up to a *revolt* (in that very term) as an action honourable and conſcientious; making publication in the next clauſe of encouragement to any town, city, or county in the three nations to begin the work.

Fifthly, The people are laboured not only to caſt off their allegiance to the king, but in direct terms to put his ſacred majeſty to death. And to the purpoſes before-mentioned tends the whole ſcope of the treatiſe.

Serjeant *Morton*. You may judge of the reſt by this: we will not put you to any more expence of time: there hath been ſufficient treaſon in that which you have read.

Ld *Hyde*. Now ſay what you will. But I muſt tell you, in thoſe particulars that have been compared, there is as much villainy and ſlander, as is poſſible for the devil or man to invent: it is to deſtroy the king in his perſon, to rob him of the love and affections of his people; to deſtroy the whole family, and all government, eccleſiaſtical and civil. And this read by yourſelf, owned, and cauſed to be printed.

Twyn. Except it was that ſheet which Mr. *L'Eſtrange* read to me when I was taken, I never heard it before, nor read it.

Ld *Hyde*. Your man ſwears that you did ſet and print part of it: it is impoſſible to compoſe and ſet, but you muſt read it. Nay, you did examine and correct the ſheets; brought them up again. Mr. *L'Eſtrange* ſwears you confeſſed you read it over; it was "mettleſome ſtuff." Mr. *Dickenſon* ſays you did not ſay you read it over; but he ſaying to you

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Twyn. I did never read or hear a line of it, but when Mr. *L'Eſtrange* read it when I was taken.

Judge *Keeling.* Was it printed at your houſe, or no?

Twyn. I know not but that it might: not that I did it with my own hand.

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Twyn. My two ſervants.

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Twyn. I did uſe to ſet them at work; but I did not ſet them on that particular work.

Ld. *Hyde.* Have you any thing elſe to ſay? God forbid but you ſhould be heard; but the jury will not eaſily believe ſuch denials againſt ſo much evidence.

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Ld. *Hyde.* Have you any thing elſe?

Twyn. It's poſſible I may, upon conſideration.

Ld. *Hyde*. We cannot ſpend all the day: I muſt let the jury know they are not to take your teſtimony.

Serj. *Morton*. I am of counſel for the king: I ſhall reply, if he will ſay no more.

Judge *Keeling*. You have heard your charge; this is your time to make your anſwer: if you do not ſpeak now, you muſt not ſpeak after. Therefore if you have any thing to ſpeak in your juſtification, or witneſſes to call, now is your time.

Ld. *Hyde*. Let me give you this caution: we cannot ſpend time in vain; we have other buſineſs before us, and it grows late. The beſt counſel I can give you, is this: you ſaid at firſt, That you deſired to be tried in the preſence of God. You are here in the preſence of Almighty God, and I would to God you would have ſo much care of yourſelf, and do ſo much right to yourſelf, to declare the truth, that there may be means of mercy to you. The beſt you can now do towards amends for this wickedneſs you have done, is by diſcovering the author of this villainous book: if not, you muſt not expect, and indeed God forbid that there ſhould be any mercy towards you.

Twyn. I never knew the author of it, nor who it was, nor whence it came, but as I told you.

Ld. *Hyde*. Then we muſt not trouble ourſelves. Did you never ſee the hand before, with which this copy was written?

Twyn. No.

Ld. *Hyde*. I am very confident you would not then have been ſo mad, as to have taken ſuch a copy: a copy fraught with ſuch abominable treaſon and lies: abuſing, in the firſt place, the late king that is dead, who was, I'll be bound to ſay it, as virtuous, religious, pious, merciful, and juſt a prince as ever reigned, and was as villainouſly and barbarouſly uſed by his rebellious ſubjects. Nay, you have not reſted here, but have fallen upon this king, who has been gentle and merciful beyond all precedent. Since he came to the crown, he has ſpared thoſe that had forfeited their lives, and all they had: and he has endeavoured to oblige all the reſt of his people by mildneſs and clemency. And after all this, for you to publiſh ſo horrid a book, you can never make amends: God forgive you for it.

Twyn. I never knew what was in it.

Ld. *Hyde*. You of the jury, I will ſay only this: That in point of law, in the firſt place, there is no doubt in the world, by the law of the land, the publiſhing ſuch a book as this is as high a treaſon as can be committed; by this

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he has endeavoured to take away the life of the king, and deſtroy the whole family, and ſo conſequently to deliver us up into the hands of foreigners and ſtrangers. It is a great bleſſing that we have the royal line amongſt us. But, I ſay, there is no queſtion (and my brothers will declare the ſame, if you doubt it) that this book is as fully treaſon by the old ſtatute, as much the compaſſing and endeavouring the death of the king, as poſſible: and he reſts not there, but incites the people to rebellion, to dethrone him, to raiſe war. And the publiſhing of this book is all one and the ſame, as if he had raiſed an army to do this. The proof is, That he ſet part, printed part, and corrected it; by his own confeſſion, read it over, It was "mettleſome ſtuff;" confeſſed how many ſheets he printed: the reward and recompence, you took notice of it. And I preſume no man among you can doubt but the witneſſes have ſpoken true: and for his anſwer, you have nothing but his bare denial. And ſo we ſhall leave it to you.

Then the jury went out; and after about half an hour's conſultation, they returned to the Court, and gave in their verdict Guilty.

Ld. *Hyde*. *John Twyn*, yours is the moſt grievous and higheſt treaſon, and the moſt complicated of all wickedneſs that ever I knew: for you have, as much as poſſibly lay in you, ſo reproached and reviled the king, the dead king, and his poſterity, on purpoſe to endeavour to root them out from off the face of the earth. I ſpeak it from my ſoul, I think we have the greateſt happineſs of the world, in enjoying what we do under ſo gracious and good a king; yet you in the rancour of your heart thus to abuſe him! I will be ſo charitable to think you are miſ-led. There is nothing that pretends to religion, that will avow or juſtify the killing of kings, but the jeſuit on the one ſide, and the ſectary on the other: indeed it is a deſperate and dangerous doctrine, fomented by divers of your tempers, and it is high time ſome be made examples for it. I ſhall not ſpend my time in diſcourſe to you, to prepare you for death; I ſee a grave perſon whoſe office it is, and I leave it to him. Do not think of any time here, make your peace with God, which muſt be done by confeſſion, and by the diſcovery of thoſe that are guilty of the ſame crime with you. God have mercy upon you; and if you ſo do, he will have mercy upon you. But foraſmuch as you *John Twyn* have been indicted of high-treaſon, you have put yourſelf upon God

God and the country to try you, and the country have found you guilty: therefore the judgment of the Court is, and the Court doth award, "That you be led back to the place from whence you came, and from thence to be drawn upon an hurdle to the place of execution; and there you ſhall be hanged by the neck, and being alive, ſhall be cut down, your entrails ſhall be taken out of your body, and you living, the ſame to be burnt before your eyes: your head to be cut off, your body to be divided into four quarters, and your head and quarters to be diſpoſed of at the pleaſure of the king's majeſty. And the Lord have mercy upon your ſoul."

Twyn. I moſt humbly beſeech your lordſhip to remember my condition, and intercede for me.

Ld. *Hyde.* I would not intercede for my own father in this caſe, if he were alive. *State Trials*, Vol. II. 528.

The Behaviour and Speech of Mr. John Twyn, *at his Execution.*

IN the interval, betwixt the condemnation and execution of *John Twyn*, which was but a few days, divers applications were made to him, in order both to his temporal and eternal good; and in particular, Mr. *Weldon*, the ordinary of *Newgate*, ſpent much time and pains upon him, to convince him of that horrid crime, for which he was to ſuffer; particularly preſſing him to a confeſſion both of his offence, and of the author of that treaſonable piece, for which he was to die. His anſwer was, That it was not his principle to betray the author, but it belonged to others; whereupon, Mr. Ordinary demanded of him, What it was that could prevail with him to undertake the printing of it? He ſaid, He was a poor man; that he had received forty ſhillings, and the promiſe of a larger ſum, whereupon he undertook it; but who it was that made him that promiſe, he would not diſcover.

Mr. Ordinary did likewiſe further urge him to a confeſſion of the author, upon a confidence, that ſuch a diſcovery might ſave his life: to which he replied, That he neither could do it, nor did believe himſelf obliged to it, if he could; for better (ſays he) one ſuffer, than many. Being preſſed to receive the bleſſed ſacrament, he returned, That he was not free to do it; he was againſt receiving according to the forms of this Church, and he hoped he might do well enough without it; and in this temper he continued till he came to the place of execution, where going up

the

the ladder, Mr. Sheriff told him, That if he had any thing to ſay, he ſhould remember the cautions he had given him.

Twyn. I ſuppoſe this appearance of people doth expect that I ſhould ſay ſomething as to the matter I came here for. It is true, I come here condemned as a traitor, for printing a book, taken to be, and owned to be, and judged to be, ſcandalous and ſeditious.

Sir *R. Ford.* And treaſonable, put that in too.

Twyn. For my own part, I can ſay this, I knew it not to be ſo, till I came to the bar, to be tried; I was ſurprized in the doing of it, both in the beginning, and at laſt, I was clear and free in my own thoughts, as not to intend any ſedition.

Sir *R. Ford.* I would not willingly interrupt a dying man; I told you before that you muſt not declare any thing in juſtification, or mitigation of ſo foul a crime; but if you had any thing to ſay that was for the diſburthening of your own conſcience, or to give any good admonitions to the people to beware of falling into the like crime, you ſhould be patiently heard; but I wonder you ſhould go about to juſtify yourſelf in this, when you did confeſs both to my brother here, and myſelf, after ſentence, that *that* which was paſſed upon you, was juſt and deſerved.

Twyn. I do not ſay otherwiſe of it, but that it was juſt: but as to my ignorance of the matter of intending or imagining to foment and contrive any ſuch thing tending to ſuch ends, but barely for getting a little money for my family; I was as clear as the child unborn of any other deſign knowingly, of any ſuch thing, I do look upon it as a ſurprizal. Firſt, I was ſurprized in this matter, by reaſon of that dangerous ſickneſs, and weakneſs I was in when it was brought; I received it with my own hands, but it was wrapt up in waſte paper, and ſo I delivered it to my ſervant, he went on with it; and two or three days after, it was taken from me by thoſe that came to ſearch my houſe, who themſelves told me, they came upon information; ſo that it was a matter I was ſurprized with when it was brought in, by reaſon of my ſickneſs and weakneſs, being unable to overlook it: and likewiſe as ſoon as it was brought in, the third day I was diſcovered in it, by ſome way of information; and whether thoſe that were the ſenders of it in, might not be the diſcoverers, I know not. Some diſcovery was made by the confeſſion of thoſe that ſearched my houſe: they came by information, not by chance. Then when they had taken me, I did ingenuouſly acknowledge and confeſs who I had

had it of: and yet for all this, the ſearching after thoſe perſons concerned was neglected that whole day, though they were at home, and eaſy to be taken; I could prove it.

Sir *R. Ford.* Mr. *Twyn*, give me leave to tell you once more, that I am heartily ſorry you have given me the occaſion to interrupt you a ſecond time; all theſe things you pleaded at the bar, and ſaid as much as you could; the wiſdom and juſtice of the bench did not think this to be a ſufficient excuſe of that treaſon you are found guilty of; I would aſk to what end this diſcourſe tends; tell me your end?

Twyn. My end is this, and it pleaſe your worſhip, to ſhew how ignorant and unacquainted I was with the nature of the thing; and how far I was in my conſcience, from intending that treaſon.

Sir *R. Ford.* You ſay you were ſurprized, and that you knew not the treaſon; was it not clearly and plainly (by your own ſervant) proved that you compoſed ſome part of it, and printed it yourſelf, and corrected it? You underſtood *Engliſh*, or elſe you could not correct it; if you underſtood *Engliſh*, or ſenſe, you could not be ignorant that it was a horrid piece of treaſon, ſuch as no honeſt man ought to ſee and conceal one half hour: therefore do not juſtify yourſelf, it ſerves not to any purpoſe here, or in the world to come: if you are not guilty of the malice, you have the more eaſy acceſs to comfort hereafter; but that will not help you here on earth: pray ſpend that little time you have to ſome better purpoſe than this; if you have any thing to ſay that may become a modeſt man to ſay, we are willing to hear it: if you can remember any perſon that aſſiſted you in correcting it, or otherwiſe were concerned in it, ſay it.

Twyn. No perſon aſſiſted me, I corrected it not; it was carried out of my houſe to correct, and brought in corrected.

Sir *R. Ford.* You ſhall not ſay that you are denied that chriſtian liberty a dying man ought to have; we are not to ſuffer any reflections on this buſineſs, you had a fair trial: I ſay, we would not deprive you of your liberty of ſpeaking, but do not abuſe that liberty that is given you, by ſpending your time impertinently, and fruitleſsly; but if you have any thing further to offer to God, which is more for your good, go to that.

Twyn. I ſhall forbear to inſiſt any further, as to the narration of that matter; I ſhall be very unwilling and tender of reflecting any thing upon the king, or the government, or give offence to your worſhips any way.

Sir

Sir *R. Ford.* Nothing but that ſhall offend us.

Twyn. I ſhall go to prayer.

Sir *R. Ford.* Do, do, we will join with you, and pray for you.

He continued in private prayer on the ladder ſometime.

Sir *R. Ford.* Executioner, do not turn him off, till he has given you a ſign.

Mr. Ordinary of *Newgate.* Mr. *Twyn*, give a ſign to the executioner, when you have done; you muſt not throw yourſelf off, you will be your own executioner in that.

Twyn. Executioner, when I give you the ſign, by pulling you by the ſhoe, then turn me off.

Executioner. I will, I will, the Lord bleſs thy poor ſoul.

Afterwards, the executioner coming down, Mr. *Twyn* told him, the ſign ſhould be by moving his foot.

Twyn. "O Lord, hear the prayer of thy poor ſervant, receive me into thy mercy. Lord, in thee I believe, receive my ſpirit; Lord Jeſus! let my prayers be acceptable in thy ſight: O Lord, my ſtrength, and my Redeemer; O Lord, I beſeech thee, receive me into the arms of thy mercy; let me have an inheritance with thee, to live with thee for ever, and then come, Lord Jeſus! come quickly."

Then giving the ſign, the executioner did his office; and being cut down, his head was ſevered from his body, and his body divided into four quarters, which are to be diſpoſed of as the king ſhall aſſign; ſince which time, his head is placed over *Ludgate*, and his quarters upon *Alderſgate*, and other gates of the city. *State Trials*, Vol. VIII. 386. *Appendix.*

The TRIAL of THOMAS BREWSTER, Bookſeller, SIMON DOVER, Printer, and NATHAN BROOKS, Book-binder in the *Old Bailey*, for printing and diſpoſing Seditious Libels, 22 *February* 1663-4, 15 *Charles* II.

THESE were arraigned at the ſame time with *John Twyn*: the charge againſt *Brewſter* was for a libel entitled, "The ſpeeches and prayers of ſome of the late king's (*Charles* I.) judges, the time of their deaths, together with ſeveral occaſional ſpeeches, paſſages in their impriſonment, till they came to the place of execution; faithfully

faithfully and impartially collected for further ſatisfaction." Among the ſeditious paſſages laid in the indictment, was an extract of a letter from *Cooke*, the regicide, to his friend, wherein he ſays, "The cauſe for which I am in bonds, is as good as ever it was: and I believe there is not a ſaint that hath engaged with us, but will wiſh at the laſt day, that he had ſealed to the truth of it with his blood: I am ſatisfied, it is the moſt noble and glorious cauſe, that has been agitated ſince the apoſtolical times; being for truth, holineſs, and righteouſneſs; for our liberties as men and as chriſtians; for removing all yokes and oppreſſions: it is ſuch a cauſe, that the martyrs would come from heaven again to ſuffer for it, if they might: I look upon it as the moſt high act of juſtice (the murder of king *Charles* I.) that our ſtory can parallel, &c."

Serj. *Morton*. May it pleaſe your lordſhip, and you gentlemen of the jury; I am of counſel for the king againſt *Thomas Brewſter*, bookſeller, that ſtands here indicted, for that he, contrary to the duty of his allegiance which he owes to our ſovereign lord the king, did cauſe maliciouſly a ſeditious and ſcandalous book to be printed, wherein there are divers ſcandalous clauſes contained, that are in diſparagement of the king's royal prerogative, and againſt his government, crown and dignity; and likewiſe that he hath ſold and uttered the ſame books in contempt of his majeſty's laws. This is the effect of the indictment: It has been proved to you by four witneſſes, that for which he ſtands indicted; Firſt, That he did cauſe part of the book to be printed; that's clearly proved by *Creek*: likewiſe that he hath ſold and uttered thoſe books in his ſhop: nay, he confeſſes that he did, and ſays they were ſold openly as a *Diurnal;* and therefore he thinks it was lawful for him to do it. He has gone about to make a defence of this ſeditious behaviour; he tells you he did not print all the book; it is not ſaid, that he printed ſuch and ſuch a letter of the book, but that he cauſed ſuch a book to be printed: and it is to be preſumed, if he cauſed one part, he would cauſe the other, or otherwiſe it would be a book of maimed ſenſe and imperfect. Gentlemen for the uttering and ſelling of them, that himſelf confeſſes: you have heard the excuſes he hath made; whether you will not find him guilty of this crime, that I muſt leave to you, and the direction of the Court. The evidence for the proſecution was as follows:

Thomas Creek, a printer, depoſed, that *Brewſter*, the priſoner, delivered him part of the copy of the ſaid ſpeeches to print, and that he printed as far as folio 36: that the firſt impreſſion

impreſſion was 3000; and he printed part of a ſecond, and delivered the books to ſuch book-binders as *Brewſter* directed him.

George Threſher depoſed, that *Brewſter* employed him to fold and ſtitch part of the books, and that he delivered them again to *Brewſter*, who paid him for them: and other witneſſes confirmed the teſtimony of theſe.

Brewſter, in his defence, obſerved, that the witneſſes did not teſtify that he had publiſhed the ſpeeches maliciouſly, or with any deſign againſt government; and that it was not uſual with bookſellers to read what they ſold: ſelling books was his trade; it was only a bare exerciſing his trade, and he knew no evil in it: that the book alſo came out at a time when there were no licenſers of the preſs, no ſettled rules for their direction, and he did not think himſelf accountable for what was in it: that it was more than three years ſince the book was printed, aud it was ſold publickly, not clandeſtinely; and laſtly, he offered to bring evidence, that he was not a ſeditious or diſaffected perſon.

Ld. *Hyde*. You of the jury, you ſee the indictment is for cauſing a libellous and ſeditious book to be printed, under ſuch a title, that is, "The Speeches and Prayers, &c." it is for cauſing this, ſeditiouſly, factiouſly and wickedly to be printed; and for ſelling and publiſhing it abroad to the king's people. For the matter of evidence, you have heard it: I will not repeat the particulars to you, only ſomething to what he has ſaid, that you may not be miſled. Firſt, he ſays, it does not appear, that he did it maliciouſly or knowingly; there are ſome things that you that are of the jury are not to expect evidence for, which it is impoſſible to know but bythe act itſelf. Malice is conceived in the heart, no man knows it unleſs he declares it: as in murder, I have malice to a man, no man knows it; I meet this man and kill him; the law calls this malice. If a man ſpeaks ſcandalous words againſt a man in his calling or trade, he lays his action, malice, though he cannot prove it but by the words themſelves. If I ſay a printer or ſtationer is an ignorant perſon, has no ſkill in his trade, I would not have any man to deal with him, he underſtands not how to ſet letters, or the like; here is nothing of malice at all appears, yet if you bring your action, you muſt lay it, maliciouſly: it is the deſtroying your trade, and you will have damages. I inſtance in this particular, that you may ſee there is malice ſuppoſed to a particular private perſon in that ſlander, much more to the king and the ſtate. The thing itſelf, in cauſing a book to be printed that is ſo full of ſcandals and lies, to

inveigle, miſguide and deceive the people, this is, in conſtruction of the law, malice; and though no malice appear further. The next is this; factiouſly, ſeditiouſly, knowingly: this carries ſedition as well as malice. Such a barbarous tranſcendent wretch that murdered his prince, without the leaſt colour of juſtice, to declare that "he rejoiced in his bonds; and that the martyrs would willingly come from heaven to ſuffer for it." Horrid blaſphemy! "All the ſaints that engaged in it, to wiſh that they had ſealed it with their blood!" What can you have more to encourage and incite the people to the killing of kings, and murdering their lawful prince! this they publiſh, and ſay it was ſpoken publickly; let it be upon his own ſoul that did it: for in caſe he did it, no man knew it but thoſe that heard it. But to publiſh it all over *England*, (3000 of the firſt impreſſion, and a ſecond;) this is to fill all the king's ſubjects with the juſtification of that horrid murder: I will be bold to ſay, not ſo horrid a villany has been done upon the face of the earth, ſince the crucifying of our Saviour. To print and publiſh this, is ſedition. The next thing is your trade. I have a calling to uſe, and may juſtify the uſing of it, ſo long as I uſe it lawfully, but that muſt not juſtify me in all manner of wickedneſs againſt the king and ſtate. As if a lawyer (I will put it in my own coat) plead a man's cauſe, and againſt the king; this is juſtifiable, he ought to plead for his client, but he muſt plead as becomes him. If a lawyer in defence of his client will ſpeak ſedition, do you think that he is free from being puniſhed? ſo of a printer; if a printer prints ſeditious and factious books, he muſt look to himſelf; that's no part of his calling to poiſon the king's people: ſo though printing of a book be lawful, he muſt uſe it as the law appoints him, and not to incite the people to faction. Writing of letters, you know is common and lawful; but if I write treaſonable letters, give notice to riſe, do ſuch and ſuch unlawful acts, I am to be puniſhed for theſe letters. A printer he is a publick agent, he is to do what he is able to anſwer, or elſe he muſt take what follows. He ſays, there was no act againſt him: it is true, you ſee he is not indicted upon the ſtatute, but at the common law, for an offence in the nature of a libel. If I were a printer, and would compile a pamphlet againſt a man, though not in authority, and diſparage him, this is the publiſhing of a libel, and an offence for which he ought to be indicted, and puniſhed by the common law; and he that prints that libel againſt me, as a publick perſon, or againſt me as Sir *Robert Hyde*; that printer, and he that ſets him at work, muſt anſwer

ſwer it, much more when againſt the king and the ſtate. Another thing is this; he talks to you of dying mens words: if men will be ſo vile to be as wicked at their deaths, as they had been in their lives; put the caſe of that man on *Saturday* convicted for printing a horrible villainous thing, if he will be ſo unchriſtian to himſelf, as to juſtify this at his death, or to ſpeak as bad as he had cauſed to be printed, is that a juſtification to publiſh them, becauſe they are the words of a dying man? God forbid. A robber declares upon the gallows, it is for a noble cauſe, for taking a purſe upon the high-way, that it is an unjuſt law to condemn to death for ſuch crimes. Shall any man publiſh this in print, and not be liable to be puniſhed for it? If any that were tried here upon *Saturday*, ſhall vilify the lord mayor, or any of the bench, traduce them for doing of juſtice, ſhall this go unpuniſhed, if a man take it up and print it? This I ſpeak to let you ſee this is without colour of law: he pretended he did it not knowingly; I will not repeat the evidence; "He ſent for them, had them ſtitched, cauſed them to be kept privately," (not upon the ſtall.) And obſerve, he tells you it was done long ago: it is but three years ago that they were as publicly ſold as *Diurnals*, he ſays. I ſhall repeat no more, I know you are men of underſtanding and of obedience to your king; it is high time to take notice of this diſperſing of pamphlets: if therefore you do believe that he did cauſe it to be printed, or publiſhed it, or both, he is guilty of the miſdemeanor laid in the indictment; (and he hath a great kindneſs in that it is not made capital:) If you believe that he did either cauſe it to be printed or publiſhed, that is enough to find him guilty of this indictment.

Brewſter was now a ſecond time indicted for printing and publiſhing a libel called the "Phœnix; or, the Solemn League and Covenant;" in which it was declared, "that a king abuſing his power to the overthrow of religion, laws, and liberties, which are the very fundamentals of this contract and covenant, may be controuled and oppoſed: and if he ſet himſelf to overthrow all theſe by arms, then they who have the power, as the eſtates of a land, may, and ought to reſiſt by arms, becauſe he doth by that oppoſition, break the very bonds, and overthrow the eſſential of this contract and covenant: this may juſtify the proceedings of this kingdom, againſt the late king, who in an hoſtile way, ſet himſelf to overthrow religion, parliaments, laws, and liberties; and that the breaking this covenant, was greater ſin than the breaking a commandment."

Serj. *Morton*. May it pleaſe your lordſhip, and you gen-

tlemen of the jury, here is another bill of indictment preferred againſt *Thomas Brewſter*; it is, that contrary to the duty of his allegiance to his ſovereign lord the king, and purpoſely to incite the people to ſedition, and to withdraw them from their natural allegiance to the king, he hath cauſed to be imprinted, maliciouſly, falſely and ſcandalouſly, a certain ſcandalous book, entitled, "The Phœnix, &c." And this he hath done to diſturb the peace of the kingdom, and to withdraw the people from their allegiance; and to the ſcandal of his majeſty's government, he hath cauſed this book to be printed, uttered and ſold: and this we take to be a great offence againſt the king, and his crown and dignity. Gentlemen, the diſperſing of ſeditious books is of great danger to the kingdom; falſe rumours, they are the main incentives that ſtir up the people to ſedition and rebellion, that raiſe diſcontentments among the people, and then preſently they are up in arms. Diſperſing ſeditious books is very near akin to raiſing of tumults; they are as like as brother and ſiſter: raiſing of tumults is the more maſculine; and printing and diſperſing ſeditious books, is the feminine part of every rebellion. But we ſhall produce our witneſſes, we ſhall prove that this *Thomas Brewſter* cauſed the book to be printed; that when it was printed he did receive three hundred; that theſe he cauſed to be ſtitched up; that he uttered and ſold them, part in his own ſhop, and part elſewhere. It being an offence of that great and dangerous conſequence, which tends to the diſturbance of the peace of the kingdom, I hope you will take it into your ſerious conſideration, and if the matter ſtand proved againſt him, you will give him his due demerit.

It was fully proved that the priſoner, with ſome other bookſellers, his partners, cauſed this libel to be printed, ſold, and diſperſed privately, about three years before; and it appeared to be taken chiefly out of Mr. *Calamy's* and Mr. *Douglas's* ſermons that were in print.

Brewſter in a manner confeſſed the fact, but obſerved in his defence, that he did but put together, what had been before printed ſeparately with a licence.

Ld. Ch. Juſt. *Hyde*. You of the jury, you ſee the indictment agrees with the book. There's a great deal of mercy that this man hath not been indicted of treaſon; for thoſe very particulars you have heard are as high treaſon as can be. Firſt, he doth declare, "That the king abuſing his power, the people may reſiſt, and take up arms againſt him:" that's expreſs treaſon, without any more ado. Then he tells you what a horrid thing it is to break that *Solemn League and Covenant*;

Covenant; juſtifies the raiſing of arms and rebellion againſt the late king, unthroning and murdering of him. I tell you that *Solemn League* and *Covenant* was a moſt wicked and ungodly thing, againſt the law of God, and the law of the land. To have ſuch villainous ſtuff to be publiſhed, it is a great mercy of the king it had not been drawn higher. You ſee the man is ſo far from acknowledging any guilt, that he juſtifies the fact.

Brewſter. No, my lord, I do not juſtify myſelf.

Ld. Ch. Juſt. *Hyde*. Yes, you do. The printer ſwears he was to go ſhare and ſhare like: he had his part; he publiſhed them to ſome particular friends: I ſay he juſtifies this. He tells you in his defence, That it was commonly printed; that it was done by printed copy, and that done formerly by licence: and when things are printed by licence, they do not expect or need any new or ſecond licence: they were commonly ſold aſunder; here they are only printed together. That he ſays is nothing. What is this but juſtifying the printing of it? Obſerve, weigh, and ſee what kind of defence here is. The title, what is it? *The Phœnix, or Solemn League and Covenant*. You all know it, and rue it. When was it printed? It was when the wicked rebels here could not ſeduce ſufficient numbers of the king's ſubjects to ſupport their rebellion; and then they invite their dear brethren (as they called them) the *Scots*, to unite with them. The *Scots* were cunning; they would not do it till they had entered into a covenant, in a league; and then they conſent to unite with the rebels here. This league and covenant was indeed in defence of the king; but how long? So long as he defended them, (the preſbytery and *Scotch* diſcipline.) When they had got this good king into their hands, they put what terms upon him they pleaſed; and then were theſe ſeditious ſermons printed. *Douglas*'s was printed in *Scotland;* was it licenced here? No, it was done there, and brought hither. Then for the other ſermon, by what licence was that printed? Obſerve the time when it was printed; was it not to ſet forward rebellion, to ſet up the *Scotch* preſbytery; and this in forty-five, when they were in arms againſt the king, after the king put himſelf upon his defence, and was at *Oxford?* Do you tell me of the licence of rebels then for your juſtification? Now, when the king is ſo happily returned, now to publiſh theſe things afreſh to the people, that they might do the ſame again! And I tell you once again, it is mercy in the king that he was not indicted for treaſon; I ſhall leave it to you, you have had it fully proved.

SIMON

SIMON DOVER was now ſet to the bar and the indictment againſt him read, which charged him with printing and publiſhing and having a ſhare in the preceding libels, entitled, *The Speeches and Prayers*, &c.

The fact was proved, and *Dover* did not deny it, but ſpoke as follows in his defence.

The title of the book ſays, "Faithfully and impartially collected for further ſatisfaction;" ſo that it cannot be interpreted maliciouſly. It's a maxim in law, that "the beſt interpretations are to be put upon the words of the indictment, in favour of the priſoner at the bar:" and I hope this honourable bench and the jury will mind that. I am a printer by trade; what I did was for my livelihood: the ſcripture ſays, "He is worſe than an infidel that takes not care for his family." I ſpeak not this to juſtify any thing againſt his majeſty or his government. Through my ignorance I may poſſibly tranſgreſs: if I have done any ſuch thing, I am ſorry for it; I hope I ſhall be more careful for the future. The other part of the indictment is for ſelling of them: no man ſwears that I ſold one book of them. Mr. *Creek* ſays, That ſome of his men told him that they had ſome of thoſe ſheets from ſome of my folks; but of whom he does not ſay. That I did meddle with them, knowing them to be ſcandalous, I hope there is nothing proved of that nature: there being then *no law*, I humbly hope there was *no tranſgreſſion*.

Ld. Ch. Juſt. *Hyde*. Have you done?

Dover. I humbly deſire your honours, and this jury, to take notice of what I have ſaid.

Ld. Ch. Juſt. *Hyde*. You of the jury, I will not ſpend time (it is too late) in repeating the evidence particularly, and his anſwer. He doth in part make the ſame anſwer with his fellows, which was, That it is his trade. It's true, no doubt but he ought to maintain his wife and children by his lawful calling; but if a thief ſhould tell you that he maintained his wife by ſtealing, is that lawful? Printing books lawfully, no man will call him to account for it; but if he prints that, which is abuſive to the king and his government, that's no part of his trade, and his trade will not bear him out in it: he is charged for printing and publiſhing of theſe ſcandalous books, That he did it *knowingly*, *maliciouſly*, *falſely*, *factiouſly*, and *ſeditiouſly*. I told you, That although all theſe things be not proved, yet if he did it, the law calls it *malice*, *faction*, *ſedition*. Conſider theſe circumſtances: you ſee it is done in the dark; the ſheets delivered at his houſe, and diſcourſe about delivery of them; he would not deliver them

them unleſs *Brewſter* and *Calvert* were agreed. I leave the evidence to you in this caſe: pregnant, ſtrong, undeniable circumſtances are good evidence. Though a man doth not come and tell you he declared to him he knew what was contained in this book, yet if there be ſufficient evidence to ſatisfy you in your conſciences, that he knew what was in it, and was privy to the printing and publiſhing of it; there is enough for you to find the indictment. You are to weigh circumſtances as well as pregnant full proof, in caſes of this nature.

NATHAN BROOKS was now brought to the bar, and the charge againſt him read, which was for publiſhing and diſperſing the libel, entitled *The Dying Speeches, &c.* The fact was proved, and in his defence he ſaid,

I deſire you to conſider, I being only a workman, how can I be guilty of ſedition and ſcandalous things? I never printed any thing, I am only a bookbinder, that's my trade: I hope you will conſider, that I am only a bare workman. My lord, I deſire when they go out, that ſomebody may ſtand at the door, that nobody may go in to the jury,

Ld. Ch. Juſt. *Hyde.* We will take care of that: have you any more to ſay?

Brooks. No, my lord.

Ld. Ch. Juſt. *Hyde.* You of the jury, you have heard ſo much of the other indictments of the ſame nature, I need not ſay much to this. That which he ſpeaks touching his trade, I muſt repeat the ſame as before; he is not queſtioned for uſing, but abuſing of his trade: for publiſhing and diſperſing ſeditious and ſcandalous books, printing and publiſhing, but the evidence is only for publiſhing. If you be ſatisfied that he publiſhed it, that's the crime; printing alone is not enough, for if a man print a book to make a fire on, that's no offence, it is the publiſhing of it which is the crime. You have heard the evidence, how far forth it is proved, two hundred delivered to him, fifty by him delivered to another: this book you ſee his own conſcience tells him what it was; when Mr. *L'Eſtrange* came, he would have ſlipt it into his gueſt's chamber; he refuſed it: then he carries it to another. Lay your evidence together; if you find him guilty of the publiſhing, it is enough.

Jury. We deſire to know upon what ſtatute law this indictment is grounded?

Ld. Ch. Juſt. *Hyde.* Upon none; but it is an offence at common law, I told you ſo at firſt.

[The

[The jury went forth, and after near an hour's conſultation, returned to the court, with their verdict againſt all three GUILTY.]

Ld. Ch. Juſt. *Hyde*. You three, *Thomas Brewſter*, *Simon Dover* and *Nathan Brooks*; you have been ſeverally indicted for a heinous and great offence: *Brewſter*, you have been indicted for two ſeveral books, as full of villainy, and ſlander, and reproach to the king and government, as poſſibly can be: and I will tell you all three, "it is the king's great mercy you have not been indicted capitally;" for every one of theſe books are filled with treaſon, and you for publiſhing of them, by ſtrictneſs of law, have forfeited your lives and all to the king: it is his clemency towards you. You may ſee the king's purpoſes: he deſires to reform, not to ruin his ſubjects. The preſs is grown ſo common, and men take the boldneſs to print whatever is brought to them, let it concern whom it will; it is high time examples be made. I muſt let you and all men know, by the courſe of the common law, before this new act was made, for a printer, or any other, under pretence of printing, to publiſh that which is a reproach to the king, to the ſtate, to his government, to the church, nay to a particular perſon, it is puniſhable as a miſdemeanour. He muſt not ſay, "He knew not what was in it;" that is no anſwer in law. I ſpeak this, becauſe I would have men avoid this for time to come, and not think to ſhelter themſelves under ſuch a pretence. I will not ſpend time in diſcourſing of the nature of the offence, it hath been declared already; it is ſo high, that truly the higheſt puniſhment that by law may be juſtly inflicted, is due to you. But, *Thomas Brewſter*, your offence is double: therefore the judgment of the court is,

"That you ſhall pay to the king, for theſe offences committed, an hundred marks: And for you, (the other two) *Simon Dover* and *Nathan Brooks*, you ſhall pay either of you a fine of forty marks to the king.

"You ſhall each of you ſeverally ſtand upon the pillory from eleven to one of the clock in one place at the *Exchange*, and another day (the ſame ſpace of time) in *Smithfield*; and you ſhall have a paper ſet over your hats, declaring your offence, For printing and publiſhing ſcandalous, treaſonable, and factious books againſt the king and ſtate.

"You ſhall be committed till the next goal-delivery without bail; and then you ſhall make an open confeſſion and acknowledgment of your offences in ſuch words as ſhall be directed you.

"And afterwards you ſhall remain priſoners during the king's

king's pleaſure: and when you are diſcharged, you ſhall put in good ſecurity by recognizance, yourſelves 400l. a-piece, and two ſecurities each of you of 200l. a-piece, not to print or publiſh any books, but ſuch as ſhall be allowed of. And this is the judgment of the Court. *State Trials*, Vol. II. 540.

The TRIAL of WILLIAM STAYLEY, Goldſmith, for Treaſonable Speeches, at the *King's-Bench* Bar, the 21ſt of *November*, 1678. 30 *Car.* II.

THE indictment charged the priſoner with high-treaſon, in compaſſing the death of the king: and the overt-act laid to prove it, was certain treaſonable words, ſaid to be ſpoken by him, the 14th inſtant, in *French*, importing, "That the king was a great heretick, and the greateſt rogue in the world:" adding, "Here is the heart, and here is the hand that would kill him: the king and parliament think all is over; but the rogues are miſtaken."

The witneſſes produced, were firſt, Captain *William Carſtairs* who depoſed, That the priſoner, and one *Fromante*, a *Frenchman*, being at the *Black-Lion* ale-houſe in *King-ſtreet*, the 14th of that month, *Fromante* ſaid in *French*, "That the king of *England* was a tormentor of the people of God;" and the priſoner anſwered again in *French*, "He is a great heretick, and the greateſt rogue in the world;" and ſtriking his hand on his breaſt, and ſtamping five or ſix times, added, "Here is the heart, and here is the hand that would kill him: the king and parliament think all is over; but the rogues are miſtaken." That the deponent was in a room oppoſite to the priſoner, and both doors being open, he ſaw him, and heard him ſpeak theſe words, and the next day he cauſed the priſoner to be apprehended.

Alexander Southerland depoſed, That he was with Captain *Carſtairs*, at the *Black-Lion*, and heard the priſoner ſpeak thoſe words, and that he immediately wrote them down in *French*, as they were ſpoken.

Philip Garret depoſed, That he was with his Captain *William Carſtairs*, at the *Black-Lion*; but not underſtanding *French*, his Captain told him the priſoner ſaid he would kill

kill the king; and bid the deponent enquire the priſoner's name, and where he lived; which he did.

L. C. J. What can you ſay to this?

Priſoner. My Lord, the matter of fact happened thus: This gentleman, Mr. *Southerland*, comes over to me in the morning when I was in the ſhop, and ſaid, Sir, I would have a red button like this, I ſaid I had none of that nature, you had better go to the *Exchange*. I would have one of a true ſtone; you muſt (I replied) go to the jewellers, I have none of theſe. Upon that I diſmiſſed him; he went over, and preſently comes, in a quarter of an hour after, and tells me, that an honourable perſon would ſpeak with me: I went over; this gentleman makes a great many ceremonies to me, and reads me this paper; he tells me, you ſee what the gentleman reads, I would adviſe you to look to it, then taking me aſide by the window, I ſaid, I do not underſtand you, I am innocent, you muſt not put any bubble upon me; with that the Captain runs out in a fury, and fetcheth a conſtable, and carrieth me to the *Gate-Houſe*. I was in my ſhop the day before, which very day I did intend to go out with a friend into the country, and prepared myſelf accordingly; and Mr. *Fromante*, the old man that was the friend of mine, comes, ſaying to me, the conſtable would have ſomething, I know not what it is, come and aſſiſt me; I went to the place, the conſtable told me, that I was to appear by ten of the clock; with that comes the old man out. I owed him a little money, I went and paid him the money which I owed him. I came back, and ſat down by the window out of ſight, the old man ſat at the right hand, ſo we ſat and diſcourſed as innocently, as I thought, and (before God) as ever I ſpake in my life.

L. C. J. What diſcourſe had you?

Priſoner. Our chief diſcourſe was about the materials of our buſineſs, and it was about the king of *France* his uſurpation over his ſubjects, and the happineſs of our little people, the commonality of *England*, that was indeed uſually our diſcourſe when we met together.

L. C. J. Did you ſay you would kill the king of *France*? and that he was a great heretick? Do you believe the king of *France* is an heretick?

Priſoner. I know not what his opinion is, that's to his own conſcience.

L. C. J. Did you name the word *heretick*?

Priſoner. Not to my knowledge, upon my ſoul, not of the king of *England*; we might have diſcourſed of the happineſs and of the difference of their governments. I

have

have been thought a perſon of ſome intelligence, and of ſome underſtanding in the world, and not to expoſe myſelf to ſpeak in a public large room, the door being open, with ſo high a voice that theſe gentlemen being in the next room ſhould hear me in *French*, and in a ſtreet where almoſt all are *Frenchmen*, to ſpeak theſe blaſphemous words, words that I abhor. I have been a great admirer of my prince.

Court. Read the ſtatute of *Decimo tertio*, &c.

L. C. J. Speak the words in *Engliſh* about killing the king, ſpeak them all.

Witneſs. That the priſoner's companion did ſay, "The king was a tormentor and perſecutor of the people of God." The priſoner's words were again, "The king of *England* is the greateſt heretick, and the greateſt rogue in the world; here's the heart, and here's the hand that would kill him; I myſelf."

Priſoner. Here's the hand, and here's the heart which would kill myſelf: not, would kill him myſelf.

L. C. J. What jeſuit taught you this trick? It is like one of them. It is the art and intereſt of a jeſuit ſo to do. [The Statute read.] [a]

L. C. J. Have you any thing more to ſay for yourſelf than what you have already ſaid?

Court. Sir *John Kirk*, do you underſtand *French?*

One of the jury. I do, my lord; the words have been interpreted all right.

L. C. J. Let me aſk you one queſtion; When you ſaid the king was "a great heretick and a rogue, and here's the heart, and here's the arm that would kill him myſelf;" was it not the king you would kill?

Priſoner. I have this to ſay in juſtification of myſelf, and

[a] The only trials for *Treaſonable Speeches* in this Compilation is that of *John James* (page 245) and this of *William Stayley*, who were both executed. This may require a little explanation, after the obſervation in page 198, that words ſpoken amount only to a high miſdemeanor, and no treaſon. In the 13th year of the reign of *Charles* the Second, an act of parliament was paſſed for the *Safety and preſervation of his Majeſty's perſon and government, againſt treaſonable and ſeditious practices and attempts*, which after reciting the miſeries and calamities they had ſuſtained for nigh twenty years, and that the cauſes thereof were the multitude of ſeditious ſermons, pamphlets and ſpeeches, that were daily preached and publiſhed, it was enacted among other things that treaſonable imaginations, devices or intentions declared in malicious and adviſed ſpeeches, ſhall be puniſhed with death and forfeiture as in caſe of high treaſon, during *the life of king* Charles *the Second*. Since his death therefore, words only without being connected with any thing elſe, can only be a high miſdemeanor.

allegiance

allegiance to my prince and king, that I never thought, nor imagined or contrived any way, but have been a true ſubject to the king upon all occaſions; I am ſorry it proves ſo, God's will be done, my ſoul depends upon it; I am a dying man by the ſtatute, never with intention, or any thought or ill-will, ſpake any word about this matter.

L. C. J. Out of the abundance of the heart the mouth ſpeaks; the ſtatute hath been read, which hath made it criminal.

A witneſs for the priſoner was now called, who ſaid, I have heard him often declare as much loyalty to his prince as any perſon. One day we fell into a diſcourſe of theſe affairs, the buſineſs of the jeſuits, which are a people he did as much condemn as any; for in *Padua* he ſaw ſo many cheats, that he forſook the jeſuitical religion, and if he knew any of the perſons concerned in this plot, he would be the executioner himſelf, and whoever comes to reign afterwards, they ſhall never enjoy ſo much peace as now; and I heard him often ſay he would loſe his blood for the king, and heard him ſpeak as loyally as I ever heard any man ſpeak in my life.

L. C. J. That is when he ſpoke to a proteſtant.

Court. Have you any thing elſe to ſay for yourſelf, or have you any more witneſſes, that you would have examined on your behalf?

Priſoner. No.

L. C. J. "The ſtatute hath been read, which was made ſince the king came in, for the preſervation of his perſon, and during his life: the parliament thought it reaſonable, even to make deſperate words to be treaſon, although there was no other thing but words, that is, ſuch words, as if the thing had been done would be treaſon, the ſpeaking it is treaſon. When we come to obſerve the manner of this ſpeaking, methinks there is no great difficulty to ſatisfy the jury that they were ſpoke adviſedly and maliciouſly. They were in a public houſe, and by accident heard: they concealed them not a moment, and not from the man that did not underſtand *French*. To hear a man ſay in a great paſſion, that his king was a heretick, and the greateſt rogue in the world, and that he would kill him, to write down the words preſently, they ſlept not upon it, they found out who he was, the next day they came to attach him; they kept him, for what? till they could get a conſtable. So that here is nothing doubtful either in the circumſtance or ſubſtance of the caſe: ſo that you cannot have a plainer proof in the world than there is in this. For

my own part, when it is in the caſe of a man's life, I would not have any compliance with the rumors or diſorder of times that ſhould be an evidence againſt him, but would have a verdict depend upon the witneſſes that ſwear the fact downright upon him. You and we all are ſenſible of the great difficulties and hazards that are now both againſt the king's perſon, and againſt all proteſtants, and our religion too, which will hardly maintain itſelf, when they have deſtroyed the men; but let them know, that many thouſands will loſe their religion with their lives, for we will not be papiſts, let the jeſuits preſs what they will (who are the foundations of all this miſchief) in making proſelytes, by telling them, do what wickedneſs you will it is no ſin, for we can ſave you, and if you omit what we command, we can damn you. This they will not own when it comes to be an objection and penal upon them, but they will never get the pope of *Rome* to declare he hath not a power to excommunicate what he calls a heretick king, and if he does, that the ſubject is not diſcharged from his obedience, they would do great ſervice to their papiſt friends, if they could obtain ſuch an edict. They print, preach, diſpute, and maintain otherwiſe, and thereby lead people to their own deſtruction and the deſtruction of others. Excuſe me if I am a little warm, when perils are ſo many, their murders ſo ſecret, that we cannot diſcover the murder of that gentleman, whom we all knew ſo well; when things are tranſacted ſo cloſely, and our king in ſo great danger, and religion at ſtake. 'Tis better to be warm here than in *Smithfield*. But that the man might have juſtice done him, he hath had his witneſſes, and might have had this old man, if he had named him to Mr. *Richardſon:* and to ſhew what fair play he has had, Mr. Attorney tells you the old man hath been examined upon oath, and offers him the copy of his examination to uſe, but he thinks not fit to uſe it for his defence, therefore nothing is ſmothered. The offence you have heard in words plain enough, unleſs the ſenſe is perverted by jeſuitical cunning and equivocation, the beſt part of their learning and honeſty. They ſwear it expreſsly, "That the king was a heretick, and the greateſt rogue in the world, and here's the heart and hand, that he would kill him himſelf;" and hath and can have no other ſignification. The ſtatute ſaith *adviſedly* and *maliciouſly*. The manner of ſpeaking, and the words ſpoke, prove both. When a papiſt once hath made a man a heretick, there is no ſcruple to murder him. Whoever is not of their perſuaſion are hereticks, and whoever are hereticks may be murdered, if the pope commands it, for

for which they may become ſaints in heaven; this is that they have practiſed. If there had been nothing of this in this kingdom, or other parts of the world, it would be a hard thing to impoſe it upon them, but they ought not to complain, when ſo many inſtances are againſt them. Therefore diſcharge your conſciences as you ought to do; if guilty let him take the reward of his crime, and you ſhall do well to begin with this man, for perchance it may be a terror to the reſt. Unleſs they think that they can be ſaved by dying in the Roman faith, though with ſuch pernicious and traiterous words and deſigns as theſe are; let ſuch go to heaven by themſelves. I hope, I ſhall never go to that heaven, where men are made ſaints for killing kings."

The jury gave their verdict Guilty.

L. C. J. I pronounce judgment upon you. You are here found guilty by the jury of high-treaſon, for ſaying you would kill the king, with other irreverent words; but the matter which makes you a traitor is proved upon you by moſt apparent evidence. The matter, manner, and all the circumſtances of it make it plain; you may harden your heart as much as you will, and lift up your eyes, but you ſeem inſtead of being ſorrowful, to be obſtinate; between God and your conſcience be it, I have nothing to do with it, my duty is to pronounce judgment upon you according to law, which is this:

The Sentence.

"You ſhall return to the priſon, from thence ſhall be drawn to the place of execution, where you ſhall be hanged by the neck, cut down alive, your quarters ſhall be ſevered and diſpoſed of as the king ſhall think fit, and your bowels burnt, and ſo the Lord have mercy upon your ſoul."

November the 26th, he was executed at *Tyburn*, according to the ſentence. *State Trials*, Vol. II. 656.

An Account of the Digging up of the Quarters of WILLIAM STAYLEY, *lately executed for High-Treaſon, for that his Relations abuſed the King's Mercy.*

WHEREAS *William Stayley* being found guilty of high-treaſon, at the *King's-Bench* bar, on *Thurſday* the 21ſt day of *November*, 1678, received then his ſentence, to

be drawn on a ſledge to the place of execution, there to be hanged by the neck, cut down alive, his quarters to be ſevered, and diſpoſed of as the king ſhall think fit, and his bowels burnt; which ſentence, on *Tueſday* next following, was accordingly executed at the common place of execution, and his quarters were brought back, and left at *Newgate*, in order to their being ſet up on the gates of the city of *London*, and his head on *London-Bridge*, as traitors quarters uſually are. But the ſaid *William Stayley* having behaved himſelf very penitently, from the time of his conviction until the time of his execution, which was atteſted by the ſeveral miniſters that viſited him during that time; and the relations of the ſaid *William Stayley* humbly petitioning his moſt ſacred majeſty, that he would be graciouſly pleaſed, that his quarters might be delivered back to them, to be privately buried, and not to be ſet up on the gates of the city: which his moſt ſacred majeſty, out of his princely clemency and compaſſion, was pleaſed to grant, and ordered the ſheriff of the county of *Middleſex* to deliver the quarters to his friends, by them to be diſpoſed of as aforeſaid; which were delivered accordingly. But ſince that, (to the great indignity and affront of his majeſty's mercy and favour) the friends of the ſaid *Stayley* cauſed ſeveral maſſes to be ſaid over his quarters, and uſed other ceremonies, according to the manner of the Church of *Rome*, and appointed a time for his interment, viz. *Friday* the 29th of *November*, 1678, in the evening, from his father's houſe in *Covent-Garden*, at which time there was made a pompous and great funeral, many people following the corpſe to the church of St. *Paul's*, *Covent-Garden*, where he was buried; which his majeſty hearing of was juſtly diſpleaſed, and demanded the coroner of the liberty of *Weſtminſter* to take up the body of the ſaid *William Stayley*, and deliver it to the ſheriff of the county of *Middleſex*, and that the ſaid ſheriff ſhould cauſe the quarters to be ſet up on the gates of the city of *London*, and his head on *London-Bridge*. The coroner, according to his majeſty's command, did immediately go to the churchwardens of St. *Paul's*, *Covent-Garden*, and cauſed the body of the ſaid *William Stayley* to be taken up, and the coffin to be broken open, to ſee that he had the right body, which when he had done, he cauſed his body to be carried to *Newgate*, and there delivered it to the ſheriff of *Middleſex*, to be diſpoſed of as aforeſaid. *State Trials*, Vol. VIII. 439.

William Scroggs.

Imprimatur Nov. 30, 1678.

The

The TRIAL of BENJAMIN HARRIS, Bookſeller, at *Guild-Hall*, for cauſing to be printed, and ſold, a libel, intitled, "An Appeal from the Country to the City, for the Preſervation of his Majeſty's Perſon, Liberty, Property, and the Proteſtant Religion." *February* 5, 1679. 32 *Car.* II.

[a] Mr. RECORDER,

I HOPE, this being a matter to be tried in the city of *London*, perſons coming here in great multitudes, come to bluſh, rather than to give encouragement to it; and if we can give your lordſhip, and this jury, ſatisfaction that this perſon is guilty of the offence, according as it is laid in the information, I hope that both you and all others that ſhall hear it, (for I perceive there is great expectation this day from this cauſe) I hope, I ſay, you will abominate any man that ſhall offer at any ſuch like thing. Indeed we live in an age where all ſorts of faction and rebellion is countenanced, magiſtrates reviled, and ſcandalized by ſome perſons, who think they have authority ſo to do. It is juſt like ſuch another kind of religion, which ſome have now of late taken up, that rather than they will be thought to turn fanaticks, they will turn plain atheiſts, and others, who ſcorn to be either, downright rebels. This book is as baſe a piece as ever was contrived in hell, either by papiſts, or the blackeſt rebel that ever was: it ſeems to carry with it a fine character, and has a figure of all plauſible obedience to the crown, to wit, "An Appeal, &c. for the preſervation of his majeſty's perſon, liberty, property, and the proteſtant religion." But if any of you have ſeen it, I hope you will be ſo far from giving any countenance to it, as that you will, with me, think it is ſo far from tending well to the government, that it is only deſigned to rake up all ſedition and rebellion, and the very worſt of all rebellion. I muſt confeſs, I would rather have believed that it was only the ſake of lucre made him do what he did, for that would have ſomewhat extenuated his crime, if he had not read it firſt; but then to go and have

[a] Sir *George Jefferies.*

have it printed, and expoſed to ſale, &c. this is a great aggravation.

If the ſame ſort of inſinuation had been uſed towards any private tradeſman, as hath been offered to the king and magiſtrates, I believe there is no man but would ſay, that ere this time he might have hid his head.

But diſſemblances of pretences for the ſake of the proteſtant religion now-a-days in his ſhop will paſs well enough, and perſons can tell you there how far you may go from hence to *Rome* with ſafety; and after they have blackened their mouths with tobacco and ſmoke, and do not rail againſt the church and government, they are looked upon ſtraight as no proteſtants.

But ſtill as to this perſon, the farther to urge it, by way of aggravation upon him, he could vauntingly make his boaſts, when it was put home to him, Why he would venture to do ſuch things, &c? That he had above a thouſand perſons who would ſtand by him in whatſoever he did.

L. C. J. Scroggs. There was hardly ever any book more pernicious to ſet us together by the ears than this, nor any thing a greater incendiary; one can hardly write a worſe—

Says he, "We in the country have done our parts in chuſing, for the generality, good members to ſerve in parliament; but if (as our two laſt parliaments were) they muſt be diſſolved, or prorogued, whenever they come to redreſs the grievances of the ſubject, we may be pitied, but not blamed. If the plot takes effect, (as in all probability it will) our parliaments are not then to be condemned, for that their not being ſuffered to ſit occaſioned it."

So that here is a ſly way of caſting it upon the king himſelf. And if it be not downright treaſon, I am ſure it is juſt upon the heels of it. It is a moſt abominable piece.

Three witneſſes proved the defendant's ſelling the book; and a fourth depoſed, that the defendant was eſteemed an anabaptiſt; and that when he was queſtioned by the company of ſtationers, for ſelling ſuch ſcandalous books, he anſwered, He had ſeveral thouſands to ſtand by him.

The defendant's counſel admitted he ſold the book, but ſaid he did not do it maliciouſly: he ſaw the book about town, and bought a parcel of them, hoping to get money by them in his way of trade; but had no intention to ſcandalize the king or government, and called two of his neighbours to teſtify he was a peaceable man, and not uſed to ſpeak diſreſpectfully of the government.

Ld. Ch. Juſt. Becauſe my brother ſhall be ſatisfied with the opinion of all the judges of *England*, what this offence is,

which they would inſinuate, as if the mere ſelling of ſuch a book was no offence: it is not long ſince, that all the judges met, by the king's command; as they did ſome time before too: and they both times declared unanimouſly, That all perſons that do write, or print, or ſell any pamphlet, that is ſcandalous either to publick or private perſons; ſuch books may be ſeized, and the perſon puniſhed by law: that all books, which are ſcandalous to the government may be ſeized; and all perſons ſo expoſing them, may be puniſhed. And further, That all writers of news, though not ſcandalous, ſeditious, nor reflective upon the government or the ſtate; yet if they are writers (as there are few others) of falſe news, they are indictable and puniſhable upon that account.

So that your hopes of any thing of that kind will be vain; for all the judges have declared this offence, at the common-law, to be puniſhable in the ſeller, though in the way of his trade: the books may be ſeized, and the perſon puniſhed.

As for this book, in particular; you can hardly read a more baſe, and pernicious book, to put us all into a flame: it gives you ſuch incitements, and ſuch baſe encouragements, with ſuch reflections upon all ſorts of perſons, (for I have read it upon this account) that I think there can ſcarce be a worſe made. He would ſet up another man, that has no title to the crown; for (ſays he) "the greateſt danger accruing to your perſons, as well as to the whole kingdom, upon the king's untimely death, will proceed from a confuſion, and want of ſome eminent and intereſted perſon, whom you may truſt to lead you up againſt a *French* and *Popiſh* army: for that which purpoſe, no perſon is fitter than his grace the duke of *Monmouth*; as well for quality, courage, and conduct, as for his life and fortune depends upon the ſame bottom with yours. He will ſtand by you; and therefore, you ought to ſtand by him. And remember the old rule is, "He who hath the worſt title, ever makes the beſt king;" as being conſtrained by a gracious government, to ſupply what he wants in title: that inſtead of God and my right: his motto may be, God and my people." He ſays, "Such a one would make a better king; for, as you ſee, the worſe the title, the better the king. A king with a bad title, makes a better king, than he that hath a good one; for he ſhall be obliged to comply with, and will humour the people, for want of a title." A thing, which is of the baſeſt nature that can be: and yet this man muſt give money to haſten the printing of ſuch a book: and he had ſeveral quires of them in his

ſhop.

ſhop. Except the writer of it, there cannot be a worſe man in the world; who, for trivial profit, will neglect the peace and quiet of his country, and ſet us all together by the ears for a groat. And, Mr. *Harris*, if you expect any thing in this world, of this kind of favour, you muſt find out the author; for he muſt be a rebellious, and villainous traitor: for, though he ſeems to inveigh againſt popery, it is only to be a rebel. And certainly, he has rejected all the laws of God, and all obedience that man requires: and profaned all holy writ. He is ſomebody, whoſe fortune does not ſuit with his condition: and who, becauſe he is not at eaſe and quiet himſelf, will let nobody elſe be ſo neither.

[Speaking to the jury, who preſently withdrew.]

You have nothing more to do, but give your verdict; If there be any thing in law, let me know it, you go out.

Then one of the jury aſked my lord, if they might not have the book with them, which was there in the court, and it was anſwerd in the negative.

Before the jury went out, Mr. *Harris* would fain have ſpoke to them for himſelf, but it was not permitted him.

Then, after a little while tarrying, they returned to the bar.

And being, as is uſual, aſked if they were agreed on their verdict, and who ſhould ſpeak for them; they anſwered, yes; and appointed their foreman, who ſaid he was guilty of ſelling the book.

At which there was a very great and clamorous ſhout.

Lord chief juſtice ſaid, that was not their buſineſs, they were only to determine whether barely guilty, or not guilty.

The recorder would have had them given their verdict by the poll, but they all unanimouſly cried out, they were all agreed, and then the foreman gave the verdict again, Guilty.

Mr. Recorder then prayed, he being for the king, that Mr. *Harris* might ſtand committed; who was thereupon preſently delivered to a Tipſtaff, to be carried to the *King's-Bench*.

Mr. *Harris* earneſtly beſeeched his lordſhip, that he might be ſent to any other priſon, and named *Newgate* three or four times, but it was not granted him: thereupon he ſaid, I hope God will give me patience to go through it.

Then my lord chief juſtice ſpake to the jury to this effect.

I am ſorry you gave countenance to this cauſe ſo much, as to ſtir from the bar, when the evidence was ſo full, and when I told you plainly, not only my opinion, but likewiſe that of all the judges of *England*, that ſelling this book was an offence at the common law, for which they ought to be puniſhed: and yet with your ſcruples, you give the party (with their hollows, and ſhoutings) to take advantage; though you did mean upon the matter the ſame thing then, you do now, yet you ſee, upon every little occaſion, when a thing ſhall ſeem to thwart the government, how ready they are to ſend up their loud hollowings. It was not ſo prudently done as might have been done.

We had need look about us, for if at ſuch a time, and for ſuch a baſe book, ſuch clamorous noiſes ſhall be made, what ſhall become of us? our lives and fortunes are at ſtake. Would I knew ſome of thoſe ſhouters, I would make them know, I would puniſh them: I am incenſed in the behalf of the government, and of all our lives and fortunes, that ſuch ſhall go unpuniſhed.

He afterwards received ſentence in the Court of *King's-Bench*, to pay 500*l.* fine: ſtand on the pillory an hour; and find ſureties for his good behaviour for three years; and had it not been for Mr. Juſtice *Pemberton*, the chief juſtice would have added, that he ſhould be publickly whipt. *State Trials*, Vol. II. 1039.

The TRIAL of Colonel ALGERNON SIDNEY, at the King's-Bench, for High-Treaſon, *November* 21, 1683. *Mich.* 35 *Car.* II.

ON the 7th of *November Algernon Sidney*, Eſq; was brought to the bar of the Court of *King's-Bench*, and the indictment read which charged him as a falſe traitor againſt *Charles* II. king of *England*, with compaſſing and conſpiring his death, and the ſubverſion of the government, and to that end aſſembling and conſulting with other traitors, on the 30th of *June*, at the pariſh of *St. Giles's* in the *Field*, in the county of *Middleſex*, how to fulfil and execute the ſame: and that he

he ſent one *Aaron Smith* into *Scotland* to invite the malecontents in that kingdom to join with the ſaid *Engliſh* traitors, to perpetrate the ſaid treaſons. And it further charged, that in order to accompliſh his traitorous purpoſes; and to perſuade his majeſty's *Engliſh* ſubjects, that it was lawful to riſe in rebellion againſt him: did at the ſame time, compoſe and write a falſe, ſeditious, and traitorous libel, wherein among other things were contained the following words, viz. "The power originally in the people of *England* is delegated unto the parliament, he (the moſt ſerene lord, *Charles* II. now king of *England*, meaning) is ſubject unto the law of God, as he is a man to the people, that makes him a king, inaſmuch as he is a king, the law ſets a meaſure unto that ſubjection, and the parliament judges of the particular caſes thereupon ariſing, he muſt be contented to ſubmit his intereſt unto theirs, ſince he is no more than any one of them in any other reſpect than that he is, by the conſent of all, raiſed above any other; if he doth not like this condition, he may renounce the crown; but if he receive it upon that condition (as all magiſtrates do the power they receive) and ſwear to perform it, he muſt expect that the performance will be exacted, or revenge taken by thoſe that he hath betrayed." And that in another place in the ſaid falſe, ſeditious, and traitorous libel, among other things, theſe falſe, ſeditious, and traitorous *Engliſh* ſentences are contained (that is to ſay) "We may therefore change or take away kings, without breaking any yoke, or that is made a yoke which ought not to be one, the injury is therefore in making or impoſing, and there can be none in breaking it," againſt the duty of his allegiance, againſt the peace of the ſaid now lord the king, his crown and dignity, &c. and againſt the form of the ſtatutes in this caſe made and provided, &c.

Clerk. How ſayeſt thou? Art thou guilty of this high treaſon whereof thou ſtandeſt indicted, or not guilty?

Col. Sidney. My lord, I find here a heap of things put together, diſtinct in nature one from another, and diſtinguiſhed by law; and I do conceive, my lord, that the indictment itſelf is thereupon void, and I cannot be impeached upon it.

L. C. J. Jefferies. We are not to admit of any diſcourſes, till you anſwer the queſtion, whether you be guilty or not guilty.

Mr. Att. Gen. If he will demur, my lord, we will give him leave.

Col. Sidney. I preſume your lordſhip will direct me, for I am an ignorant man in matters of this kind, I may eaſily

eaſily be ſurprized in it, I never was at a trial in my life of any body, and never read a law-book.

L. C. J. Becauſe no priſoner under your circumſtances is to have counſel,[a] but in ſpecial caſes to be aſſigned in matters of law, the Court is bound by their oaths and duty of their places, that they ſhall not ſee any wrong done to you; but the buſineſs that we are to tell you now is, you are to plead guilty, or not guilty, or demur, which is a confeſſion in point of law.[b]

Col. Sidney. Under favour, my lord, there may be indictments that are erroneous, and if they are erroneous and vitious, they are null, and ought not to be anſwered to.

Mr. Juſt. Withins. If you pleaſe to demur to it you ſhall have liberty to make any exceptions.

Col. Sidney. I do not demur, it is only exceptions. I think in matters of life, a man may give his exceptions to the bill, and plead not guilty afterwards. I am ſure in Sir *Henry Vane*'s caſe the Court ſaid it, and offered him to do it; that which, under favour, I hope to do.

L. C. J.

[a] In caſes of treaſon counſel are now allowed. See ante, p. 211.

[b] A *Demurrer* is an iſſue on matter of law, which in the courſe of judicial proceedings may be tendered by either party, and the meaning of it is, that there is ſome defect, or that admitting the facts to be ſtated, yet that in point of law no injury has been done, &c. and this is a queſtion that muſt be determined by the judges. A *Demurrer* is incident to criminal caſes as well as civil, when the fact as alleged is allowed to be true, but the priſoner joins iſſue upon ſome point of law in the indictment, by which he inſiſts that the fact, as ſtated, is no felony, treaſon, or whatever the crime is alleged to be. Thus for inſtance, if a man be indicted for feloniouſly ſtealing a greyhound; which is an animal in which no valuable property can be had, and therefore it is not felony, but only a civil treſpaſs, to ſteal it: in this caſe the party may demur to the indictment; denying it to be felony, though he confeſſes the act of taking it. Some have held, that if, on demurrer, the poiſit of law be adjudged againſt the priſoner, he ſhall have judgment and execution, as if convicted by verdict. But this is denied by others, who hold, that in ſuch a caſe he ſhall be directed and received to plead the general iſſue, not guilty, after a demurrer determined againſt him. Which appears the more reaſonable, becauſe it is clear, that if the priſoner freely diſcovers the fact in Court, and refers it to the opinion of the Court, whether it be felony or no; and upon the fact thus ſhewn it appears to be felony; the court will not record the confeſſion, but admit him afterwards to plead not guilty. And this ſeems to be a caſe of the ſame nature, being for the moſt part a miſtake in point of law, and in the conduct of his pleading; and, though a man by miſpleading may in ſome caſes loſe his property, yet the law will not ſuffer him by ſuch niceties to loſe his life. However, upon this doubt, demurrers to indictments are ſeldom uſed: ſince the ſame advantages may be taken upon a plea of not guilty; or afterwards, in arreſt of judgment, when the verdict has eſtabliſhed the fact. 4 *Black. Comm.* 333.

L. C. J. You muſt plead or demur.

Col. Sidney. My lord, if I put in exceptions to the bill, I do not plead 'till thoſe exceptions are over-ruled. This was in the caſe of Sir *Henry Vane.*

L. C. J. Sir, I muſt tell you, you muſt either plead or demur.

Col. Sidney. My lord, there are in this indictment ſome treaſons or reputed treaſons, that may come within the ſtatute of the 13th of this king, which is limited by time, the proſecution muſt be in ſix months, and the indictment within three. Now, my lord, if that this buſineſs that is mentioned, be above ſix months before my commitment, or above three before the indictment, I think, under favour, I ought not to anſwer theſe matters.

L. C. J. You are miſtaken in the law. That will be ſaved when the fact comes to appear. If they allege the thing to be at a time, which according to that allegation would maintain the indictment, if upon the trial, it appear otherwiſe, the Court is bound to take notice of it when you come to your trial, but we are not bound to examine that before you have pleaded.

Col. Sidney. My lord, every body will acknowledge, that there have been, or may be, vitious indictments. Now if I plead to an erroneous indictment, and am acquitted, I may be indicted again. Bills of attainder have been upon errors in original indictments, as that of the duke of *Somerſet.* Now if there be here ſeveral things diſtinct in nature, diſtinguiſhed by law, that are put together, it is impoſſible to make a poſitive anſwer to any one. If any one ſhould tell me, that I by myſelf, or by others, by ſword or by piſtol conſpired to kill the king, I can ſay, I did it, or I did it not. If any one ſay, I have levied war, and by ſeveral acts undertake to prove I have done it, I can ſay I have done it, or I have not. But here I do not find any thing ſpecified, or can tell upon what ſtatute I am indicted. I pray I may ſee the record.

L. C. J. That we cannot do[a]. You ſhall hear it read again if you will, if you think it to be a void indictment, demur to it if you will.

Col. Sidney. My lord, I deſire you to accept of this, [ſhewing a parchment.]

L. C. J. What is it? put in what plea you ſhall be adviſed; but if you put in a ſpecial plea, and Mr. Attorney demurs, you may have judgment of death, and by that you wave the fact.

I have

[a] The law is now otherwiſe. See ante, p. 245.

Col. Sidney. I cannot make any objection to the bill after I have pleaded, Not guilty, for I accept the bill thereby to be good.

L. C. J. If you can assign any matter of law, do. But otherwise what a kind of thing would it be? All criminals would say, in all cases, I doubt whether the bill be good or bad. And after I have thus considered of it, I will plead. You are misinformed, and this the Court tells you as a duty incumbent on them.

Mr. Just. Withins. If you demur, and shew what your causes are, we will assign you counsel.

Col. Sidney. I desire you would not try me, and make me to run in dark and slippery places, I do not see my way.

L. C. J. Do not apprehend yourself to be so, as if the Court would run you on any inconvenience. But they are bound to see the methods of justice preserved, they are those that you, and all the king's subjects are bound to conform to. If any one of us were in the same condition, we must observe the same methods of law.

Cl. of Cr. Art thou guilty or not guilty?

Col. Sidney. Then pray, my lord, will you tell me this, Is it true, that a man, how vitious soever an indictment is, must answer or demur to it?

L. C. J. He must either answer or demur.

Col. Sidney. Are there no exceptions to be admitted?

L. C. J. None: and if you do not do the one, or the other, judgment passes, as if you had pleaded guilty.

Col. Sidney. Here is a plea.

Mr. Just. Withins. Will you stand by it? consider yourself, and your life: if you put in that plea, and Mr. Attorney demurs, if your plea be not good, your life is gone.

Col. Sidney. Pray, my lord, give me a day to consider of it.

L. C. J. No, we must not introduce new methods or forms for any body. The same case that is with you may be with other people.

Col. Sidney. My lord, I do not pretend to any thing but what is law, and due to every man upon *English* ground. I would be very sorry to do that which may be hurtful.

L. C. J. You have the rule of the court. You must do one or the other. Call him to it.

Col. Sidney. I desire this may be read. [Shewing the same parchment.]

L. C. J. It shall not be read unless you put it in as a plea.

Mr. Sol. Gen. I must do my duty. Mr. *Williams* exceeds his liberty, he informs the prisoner several things.

Attorney

Mr. Williams. I only ſaid, if it was a plea, put it in, Mr. Attorney can hear all I ſay. [Whereupon Mr. *Williams* was reproved by the Lord Chief Juſtice.]

Col. Sidney. I only give it as exceptions to the bill.

Cl. of Cr. Art thou guilty or not guilty?

Col. Sidney. If any one ſhould aſk me any particular thing, I could tell how to anſwer.

L. C. J. He aſks you a particular thing. It is the duty of the Court to pronounce judgment, if you do not plead.

Col. Sidney. Why then, if you drive me upon it, I muſt plead.

L. C. J. I am ſure there is no gentleman of the long robe would put any ſuch thing into your head. There was never any ſuch thing done in capital matters.

Col. Sidney. My lord, I am there indicted for conſpiring the death of the king; I have not conſpired the death of the king: I am there indicted for levying of war; I have not done that: I am indicted for having invited in others of another nation; I have not done that neither: I am there indicted to have written a ſeditious libel to ſtir up the ſpirits of the people againſt the king; I have not written any thing to ſtir up the people againſt the king.——

L. C. J. We are not to hear all this, you muſt plead as other people, or elſe in plain *Engliſh* we will pronounce ſentence. We ought to give all men ſatisfaction that will be ſatisfied; but if they will not be directed we cannot help that.

Col. Sidney. My lord, if you put me upon this inevitable neceſſity, it lies upon you; I muſt plead then.

Cl. of Cr. Art thou guilty, or not guilty?

Col. Sidney. Not guilty.

L. C. J. If you be not guilty, I pray God you may eſcape.

Mr. Att. Gen. My lord, will you pleaſe to appoint a day for his trial, that he may take notice of it now?

L. C. J. What time would you have?

Mr. Att. Gen. A week's time, do you think that will be enough?

Col. Sidney. No, pray, my lord, give me a fortnight's time.

Mr. Att. Gen. I will not oppoſe it.

Col. Sidney. In the next place I deſire a copy of the indictment.

L. C. J. We cannot grant it by law.

Col. Sidney. I deſire you would pleaſe to give me counſel.

L. C. J. We cannot do it; if you aſſign us any particular point

point of law, if the Court think it ſuch a point as may be worth the debating, you ſhall have counſel: but if you aſk for counſel for no other reaſon than becauſe you aſk it, we muſt not grant it. The Court is bound to ſee that nothing be done againſt you, but what is according to the rules of law. I would be very loth to draw the guilt of any man's blood upon me.

Col. Sidney. Has not every body counſel?

L. C. J. No.

Col. Sidney. I have ſeveral points of law.

L. C. J. Tell us them.

Col. Sidney. My lord, will you oblige me that am an ignorant man, and confeſs myſelf ſo, upon hearing my indictment for things I know not of, a long thing, preſently to raiſe a point of law.

L. C. J. It is not we oblige you, Mr. *Sidney*, it is the law obliges you. We are the miniſters of the law, it is the law ſays we are not to allow you counſel without making your objections, that the Court may underſtand whether it be fit: it is the law ſays we may not allow you a copy of the indictment. Therefore do not go away and ſay that we, as men ſitting here, impoſe upon you, we ſit here only to adminiſter the juſtice of the nation.

Mr. Juſt. Withins. Sir, you will have a fortnight's time to conſider of objections in law.

L. C. J. If you will have it read, you ſhall. Thoſe things that you may have by law, God forbid but you ſhould have the benefit of them.

Col. Sidney. I deſire, my lord, to hear it read again.

Mr. Att. Gen. Would you have it read in *Latin?*

Col. Sidney. Yes, if you pleaſe, I do underſtand a little *Latin.*

Then the indictment was read in *Latin.*

Col. Sidney. What is that ſtatute?

L. C. J. When you come to your trial, Mr. Attorney will tell you what ſtatute he goes upon. And he may give in evidence any act of parliament that comprehends treaſon.

Col. Sidney. Methinks he ſhould ſay what ſtatute he goes upon.

Mr. Juſt. Withins. Sir, would you have a new indictment for you?

L. C. J. He muſt take notice of his trial this day fortnight.

night, Lieutenant of the Tower, you may take the priſoner back again.

Then the Lieutenant of the tower took away his priſoner.

ON the 21ſt of *November*, *Algernon Sindey*, Eſq; was brought to the bar of the Court of *King's-Bench*, he deſired pen, ink and paper, which were granted him. And he alſo deſired, that two perſons, (viz.) Mr. *Wynn* and Mr. *Gibbs*, might write for him, which was alſo allowed by the Court.

Col. Sidney. My lord, when I was laſt here before your lordſhip, I did deſire a copy of my indictment, and I thought the law did allow it me. But being in an hurry, carried firſt to a tavern, then led through ſoldiers, and ſurprized abſolutely, I could not give that reaſon why I thought the law allowed me a copy. My lord, I was denied a copy, and thereby I was deprived of the benefit of a ſpecial plea I deſigned to have put in. This would have been a great help to your lordſhip, and to me; the denial of which hath been a great prejudice. Now, my lord, that which I thought was law then, I think I can give a better teſtimony that it is ſo now upon the ſtatute of 46 *Edw.* III. wherein it is expreſſed, that *tout partes & tout gents*, that is, all people ſhall have a copy of every record; and it enumerates ſeveral matters, as well that againſt the king as other people. This is a general law ſtill in force: my Lord *Strafford* had a copy, and my Lord *Strafford* and the lords in the *Tower* had copies of their indictments. And, under favour, I think it was never more neceſſary than to me, there never having been, perhaps, a charge ſo long and ſo confuſed. Now, my lord, I have a copy tranſcribed of this ſtatute. [Shewing a paper.]

Ld. Ch. Juſt. *Jefferies.* We remember the law very well. Mr. *Sidney* did move for a copy of the indictment, and the Court denied him then, and ſo ſhall now. And yet all this while we ſhall deny you nothing that is law. You ſhall have the right that becomes a ſubject in your condition. And we muſt tell you, that notwithſtanding all that caſe we ought not to have given you ſo much favour (perhaps in ſtrictneſs) as we did. And becauſe you did particularly take notice of the caſe of Sir *Henry Vane* laſt time, I will ſhew you the Court did indulge more to you than was done to that perſon. In Sir *Henry Vane's* caſe, by the opinion of all

the judges, it was declared, that no copy ought to be given, neither of the whole, nor any part of the indictment, except they ſhew matter of law. But your counſel, ſince you went away, moved for the copy of the indictment; and to ſatisfy them, I directed the caſe that you took notice of to be read in the Court: and I thought they had been ſufficiently ſatisfied. You had the indictment read to you in *Latin*, which was denied in the caſe of Sir *Henry Vane*. And there is a later caſe known to moſt perſons here. By the opinion of all the judges of *England*, a copy of the indictment was denied to my lord *Ruſſel*. Therefore arraign him upon the indictment: we muſt not ſpend our time in diſcourſes to captivate the people.

Col. Sidney. Is not this a good law, my lord? [Holding out the paper.]

L. C. J. You have the rule of the Court.

Mr. Juſt. *Withins.* Any thing the law will allow you, you ſhall have; but I am ſure if you did adviſe with your counſel, they muſt tell you the ſame thing.

The charge being opened,

Mr. *Att. Gen.*[a] My lord, and you gentlemen of the jury, the priſoner at the bar ſtands indicted of the higheſt crimes, the conſpiring the death of the king, and the overthrow of the *Engliſh* monarchy. Gentlemen, we ſhall uſe this method in our evidence. We ſhall ſhew by many witneſſes, that there was a deſign of raiſing and making a rebellion within this kingdom. For, gentlemen, you muſt take notice, and I think there is no *Engliſhman* but does believe, that for ſeveral years laſt paſt a deſign was laid, and for that purpoſe ſeveral ſecret inſinuations were made uſe of, and public libels ſpread abroad to perſuade the people, that the king was introducing arbitrary power, that he ſubverted all their rights, liberties, properties, and whatever was dear to them. They endeavoured to make the world believe the king was a papiſt. And when, gentlemen, by ſuch ſtratagems they had worked upon many incautelous perſons, when they thought they had gotten a ſufficient party, then there was a deſign of an open riſing, (for they thought all things were ripened) and that was to be in ſeveral parts of the kingdom. Some perſons, to effect this deſign, were for a preſent aſſaſſination of the king. Others would do it in a more fair and gentle way. They thought it below perſons of that great quality as the priſoner is, and therefore were for doing it by open force.

When we have given that general evidence, we ſhall then come to ſhew you what ſhare and part the priſoner had

[a] Sir *Robert Sawyer.*

had in this deſign. For certainly he was looked upon as a very eminent perſon, whoſe education abroad, and former practices at home had rendered him fit to adviſe and proceed in ſuch affairs. We ſhall prove when theſe matters were ripe, this gentleman was of the council of ſtate, of the ſix that were to manage this matter of the riſing. We ſhall ſhew the ſeveral conſultations they held; one at Mr. *Hampden's* houſe, another at the houſe of my Lord *Ruſſel*. There we ſhall acquaint you what debates they had; for they acted like ſubtile men; and there they debated, whether the riſing ſhould be firſt in the country or city, or both together. They came to a reſolution it ſhould be in both places at once. Then, when they had aſſerted that point, they came to conſider the time of riſing; and upon that they thought fit to call in aid of *Scotland* firſt; and that was this gentleman's particular province. For he, being a man of great ſecrecy, was to ſend an emiſſary into that kingdom, and invite ſome perſons over to treat with them about it. We ſhall prove that an emiſſary was ſent, and this gentleman gave him a conſiderable ſum to bear his charges. We ſhall prove that ſeveral *Scotch* gentlemen, in purſuance of this reſolve, came here to treat with this great council of ſtate, about this affair: and ſhall make it appear to you, that as ſoon as ever the leaſt diſcovery of the plot was, theſe perſons concealed themſelves and withdrew, as the reſt of the plotters that have fled from juſtice.

Gentlemen, this was not enough for this gentleman to conſult on theſe ſeveral paſſages, but to demonſtrate to the world, that his head and heart was entire in this ſervice, and that he might carry it on the more effectually, he was at this very time, when this emiſſary was gone into *Scotland*, preparing a moſt ſeditious and traitorous libel; we inſtance in ſome particular words of it; but we ſhall ſhew you, that the whole deſign of this treatiſe is to perſuade the people of *England*, that it is lawful, nay, that they have a right to ſet aſide their prince, in caſe it appear to them, that he hath broken the truſt laid upon him by the people. Gentlemen, he does uſe in that treatiſe ſeveral arguments drawn from the moſt rebellious times that ever were in *England*, from the late rebellion (I muſt needs uſe the word, notwithſtanding the act of oblivion, when a gentleman ſhall now attempt to do theſe things for which he was pardoned then) and from other kingdoms were rebellion hath been proſperous againſt princes. Then he falls to reaſoning, and uſes great reaſon in the caſe, that all the power of the prince is originally in the people, and applies that diſcourſe, that the power of the king

king was derived from the people upon truſt, and they had already declared the king had invaded their rights, and therefore he comes to argue, they might aſſume that original power they had conferred. And he tells the king, that is no hard condition; if he thinks it ſo, he ſhould lay down his crown, if not, he threatens the condition would be exacted, or otherwiſe ſhould be revenged by thoſe he had betrayed; and who but this gentleman and his confederates, that thought himſelf not only able to govern this nation, but many monarchies, ſhould call him to account for it? For he lays down this principle, that though all the people do riſe againſt their prince, it is no rebellion, The whole book is an argument for the people to riſe in arms, and vindicate their wrongs. He lays it down, "That the king has no authority to diſſolve the parliament; but it is apparent the king hath diſſolved many; therefore he hath broken his truſt, and invaded our rights." And at laſt concludes with that paſſage laid in the indictment, "We may therefore ſhake off our yoke; for it is not a yoke we ſubmitted to, but a yoke by tyranny (that muſt be the meaning of it) they have impoſed on us."

Gentlemen, if we prove all theſe matters to you, I doubt not you will do right to the king and kingdom, and ſhew your abhorrence of thoſe republican principles; which, if put in practice, will not only deſtroy the king, but the beſt monarchy in the world.

The witneſſes being called, Colonel *Rumſey* and Mr. *Weſt* gave a general account of the plot; but ſaid nothing againſt the priſoner in particular, but what they had by hearſay; of which the priſoner complaining, and urging that this was done with a deſign to prepoſſeſs the jury, he was anſwered, that this was the practice at the lord *Stafford*'s trial; and at all the trials for the popiſh plot, when his friends had the direction of the proſecution.

Then the lord *Howard* was ſworn, and depoſed, that the principal conſpiators agreed, the preceding month of *January*, to form themſelves into a cabal, or council of ſix, in order to prepare matters for an inſurrection; and that the members of this cabal were the duke of *Monmouth*, the lords *Eſſex* and *Ruſſel*, Mr. *Hampden*, the witneſs, and colonel *Sidney*, the priſoner: that theſe gentlemen had a meeting at Mr. *Hampden*'s houſe, the latter end of *January*, and conſidered when, and where, it was proper to begin the inſurrection; and what magazines and money would be wanting to carry on the enterprize. That about a fortnight or three weeks after, the ſame cabal had a meeting at *Southampton* houſe (the lord *Ruſſel*'s), and it being debated what anſwer they

they ſhould give to thoſe who demanded a reaſon for the intended inſurrection, and whoſe aſſiſtance they expected, it was agreed, to reſolve all into the power of the parliament; and declare, They intended nothing but the public good. That they alſo conſidered the ſettling a good underſtanding with the lord *Argyle*, and ſome leading men of the kingdom of *Scotland*; and the inviting them to join with the *Engliſh* conſpirators. And it was agreed to diſpatch *Aaron Smith* to *Scotland*, to negotiate that affair; and to ſend a letter by him to Sir *John Cockram*, under the diſguiſe of providing for a plantation in *Carolina*. That he ſaw the priſoner (colonel *Sidney*), afterwards, put ſixty guineas in his pocket, which he told the witneſs (lord *Howard*) were for *Aaron Smith*. After this, he told him *Aaron Smith* was gone, and he had heard from him from *Newcaſtle*.

The Court demanding of the priſoner, if he would aſk this witneſs any queſtions? He anſwered, He had no queſtions to aſk him.

Sir *Andrew Foſter* being ſworn, depoſed, that Sir *John Cockram*, and the two *Campbels*, came up from *Scotland* to *London* laſt ſummer; and that Sir *John*, when he was taken, pretended they came up about making a purchaſe in *Carolina*.

Sir *Philip Lloyde* depoſed that the treaſonable libel, laid in the indictment, was found upon a deſk in the priſoner's ſtudy.

Mr. *Shepherd* and Mr *Carey* depoſed, that they had ſeen the priſoners hand to ſeveral bills of exchange, and believed the libel to be written by the ſame (the priſoner's) hand.

Cooke depoſed, that he had never ſeen colonel *Sidney* write; but he had ſeen ſeveral notes that came to him, with endorſements of his name, and they had paid them: and the writing was like this; nor were they ever called to account for miſ-payment.

Then Mr. Attorney deſired the libel might be read.

Col. Sidney deſired it might all be read.

The Chief Juſtice told the priſoner, Mr. Attorney muſt have what part he deſired read; and then he (the priſoner) ſhould have what part he deſired read afterwards.

Mr. Att. Gen. Begin there. Secondly, There was no abſurdity in this becauſe it was their own caſe.

Clerk reads.

Secondly, There was no abſurdity in this, though it was their own caſe, but to the contrary becauſe it was their own caſe, that is concerning themſelves only, and they had no ſuperior. They only were the competent judges, they decided their controverſies, as every man in his own family

ſamily doth, ſuch as ariſe between him and his children, and his ſervants. This power hath no other reflection than what is put upon it by the municipal law of the country, where any man, and that hath no other force, than as he is underſtood to have conſented unto it. Thus in *England* every man (in a degree) hath a right of chaſtiſing them; and in many places (even by the law of God) the maſter hath a power of life and death over his ſervant: it were a moſt abſurd folly to ſay that a man might not put away, or in ſome places kill an adulterous wife, a diſobedient ſon, or an unlawful ſervant, becauſe he is party and judge, for the caſe doth admit of no other, unleſs he hath abridged his own right by entering into a ſociety where other rules are agreed upon, and a ſuperior judge conſtituted, there being none ſuch between king and people: that people muſt needs be the judge of things happening between them and him whom they did not conſtitute, that they might be great, glorious and rich; but that they might judge them, and fight their battles; or otherwiſe do good unto them, as they ſhould direct. In this ſenſe, he that is *ſingulis Major*, and ought to be obliged by every man, in his juſt and lawful commands, tending to the publick good; and muſt be ſuffered to do nothing againſt it, nor in any reſpect more than the law doth allow.

For this reaſon *Bracton* ſaith, that the king hath three ſuperiors, to wit, *Deum*, *Legem*, & *parliament'*, that is, the power originally in the people of *England*, is delegated unto the parliament. He is ſubject unto the law of God as he is a man, to the people that make him a king, in as much as he is a king: the law ſets a meaſure unto that ſubjection, and the parliament judges of the particular caſes thereupon ariſing: he muſt be content to ſubmit his intereſt unto theirs, ſince he is no more than any one of them, in any other reſpect, than that he is, by the conſent of all, raiſed above any other.

If he doth not like this condition he may renounce the crown; but if he receive it upon that condition, (as all magiſtrates do the power they receive) and ſwear to perform it, he muſt expect that the performance will be exacted, or revenge taken by thoſe that he hath betrayed.

If this be not ſo, I deſire to know of our author, how one or more men can come to be guilty of treaſon againſt the king, as *Lex facit ut ſit Rea*. No man can owe more unto him, than to any other, or he unto every other man by any rule but the law; and if he muſt not be judged in his own caſe, neither he nor any other by power received from him,

him, would ever try any man for an offence againſt him, or the law.

If the king, or ſuch as he appoints, cannot judge him, he cannot be judged by the ways ordinarily known amongſt us. If he, or other by authority from him, may judge, he is a judge in his own caſe, and we fall under that which he accounts the utmoſt of all abſurdities: if a remedy be found for this, he muſt ſay that the king in his own caſe may judge the people, but the people muſt not judge the king, becauſe it is theirs; that is to ſay, the ſervant entertained by the maſter may judge him, but the maſter muſt not judge the ſervant, whom he only took for his own uſe. The magiſtrate is bound by no oath or contract to the people that created him, but the people is bound to its own creature, the magiſtrate.

This ſeems to be the ground of all our author's follies; he cannot comprehend that the magiſtrates are for or by the people, but makes this concluſion, as if nations were created by or for the glory or pleaſure of magiſtrates, and affects ſuch a piece of nonſenſe; it ought not to be thought ſtrange, if he repreſent as an abſurd thing, that the headleſs multitude may ſhake off the yoke when they pleaſe. But I would know how the multitude comes under the yoke, it is a badge of ſlavery. He ſays, that the power of kings is for the preſervation of liberty and property. We may therefore change or take away kings without breaking any yoke, or that made a yoke which ought not to be one; the injury is therefore in making or impoſing, and there can be none in breaking it.

That if there be not an injury, there may perhaps be an inconvenience; if the headleſs multitude may ſhake off the yoke, I know not why the multitude ſhould be concluded to be headleſs; it is not always ſo. *Moſes* was head of the multitude that went out of *Egypt*, *Othniel* led them againſt the king of *Meſopotamia*, under the conduct of *Phœbidas*; they obtained a victory againſt the *Moabites*; they had the like ſucceſs under *Shamger*, *Barak*, *Gideon*, *Jephtha*, *Samuel*, *Sampſon*, and others, againſt the *Canuanites*, *Midianites*, *Philiſtines*, and others; the multitude that oppoſed *Saul* and *Iſhboſheth* had *David* for its head; and the ten tribes that rejected *Rehoboam* choſe unto themſelves *Jeroboam*; the *Athenians* riſing againſt the thirty *tyrants* had *Thraſybulus*; thoſe that drave——from *Thebes* were conducted by *Pelopidas*: when the *Romans* drave out the *Tarquins*, they choſe *Brutus* and *Publicola*, and they deſtroyed the *Decemviri* under *Horatius* and *Valerius*. All the multitudes that revolted from

them under *Mauritius*, *Telerius*, *Spartanus* and others, were not headleſs; and we know of none that were, but all either found heads, or made them. The *Germans* ſet up *Arminius*; the *Britons*, and others in later times, the *Carlinians*, that roſe againſt *Peter the Cruel*, had the lord *Detracta Mara*.

The *French*, when they grew weary of the corrupted races of *Pharamond* and *Pepin*, and the ſame *Pepin* and *Hugh Capet*: the *Scots*, when they ſlew *James* III. had his ſon to be their head; and when they depoſed and impriſoned queen *Mary*, the earl of *Murray* and others ſupplied the want of age that was in her ſon: and in all the revolutions we have had in *England*, the people have been headed by the parliament, or the nobility and gentry that compoſed it; and when the kings failed in their duties, by their own authority called it. The multitude therefore is not ever headleſs, but doth either find or create heads unto itſelf, as occaſion doth require: and whether it be one man, or a few or more, for a ſhort or a long time, we ſee nothing more regular than its motions. But they may, ſaith our author, ſhake off the yoke; and why may they not, if it prove uneaſy or hurtful unto them? Why ſhould not the *Iſraelites* ſhake off the yoke of *Pharaoh*, *Jabin*, *Siſera*, and others that oppreſſed them?

When pride had changed *Nebuchadnezzar* into a beaſt, what ſhould perſuade the *Aſſyrians* not to drive him out amongſt beaſts, until God had reſtored unto him the heart of a man? When *Tarquin* had turned the regal monarchy of *Rome* into a moſt abominable tyranny, why ſhould they not aboliſh it? And when the proteſtants of the *Low Countries* were ſo grievouſly oppreſſed by the power of *Spain*, under the proud, cruel and ſavage conduct of the duke of *Alva*, why ſhould they not make uſe of all the means that God had put into their hands for their deliverance? Let any man, who ſees the preſent ſtate of the provinces that then united themſelves, judge whether it is better for them to be as they are, or in the condition unto which his fury would have reduced them, unleſs they had, to pleaſe him, renounced God and their religion: our author may ſay, they ought to have ſuffered: the king of *Spain* by their reſiſtance loſt thoſe countries; and they ought not to have been judges in their own caſe. To which I anſwer, that by reſiſting they laid the foundation of many churches, that have produced multitudes of men eminent in gifts and graces; and eſtabliſhed a moſt glorious and happy commonwealth, that hath been ſince its firſt beginning, the ſtrongeſt pillar of the proteſtant cauſe now in the world, and a place of refuge unto thoſe who

who in all parts of *Europe* have been oppreſſed for the name of Chriſt: whereas they had ſlaviſhly, and, I think I may ſay, wickedly as well as fooliſhly ſuffered themſelves to be butchered, if they had left thoſe empty provinces under the power of *Antichriſt*, where the name of God is no otherwiſe known than to be blaſphemed.

If the king of *Spain* deſired to keep his ſubjects, he ſhould have governed them with more juſtice and mercy; when contrary unto all laws, both human and divine, he ſeeks to deſtroy thoſe he ought to have preſerved, he can blame none but himſelf, if they deliver themſelves from his tyranny: and when the matter is brought to that, that he muſt not reign, or they over whom he would reign, muſt periſh; the matter is eaſily decided, as if the queſtion had been aſked in the time of *Nero* or *Domitian*, whether they ſhould be left at liberty to deſtroy the beſt part of the world, as they endeavoured to do, or it ſhould be reſcued by their deſtruction? And as for the people's being judges, in their own caſe, it is plain, they ought to be the only judges, becauſe it is their own, and only concerns themſelves.

Mr. Att. Gen. The latter end, the laſt ſheet of all, §. 35.

L. C. J. The argument runs through the book, fixing the power in the people.

Cl. of Cr. The general revolt of a nation from its own magiſtrates, can never be called rebellion.

Mr. Att. Gen. §. 37.

Cl. of Cr. The power of calling and diſſolving parliament is not in the king.

Mr. Att. Gen. So much we ſhall make uſe of; if the colonel pleaſe to have any other part read to explain it, he may.

Then the ſheets were ſhewn to Col. *Sidney*.

Col. Sidney. I do not know what to make of it, I can read it.

L. C. J. Ay, no doubt of it, better than any man here. Fix on any part you have a mind to have read.

Col. Sidney. I do not know what to ſay to it, to read it in pieces thus.

L. C. J. I perceive you have diſpoſed them under certain heads: to what heads would you have read?

Col. Sidney. My lord, let him give an account of it that did it.

Mr. Sol. Gen. We have done, unleſs the jury deſire to have the words of the libel read again. [But they did not.]

Col. Sidney. My lord, I deſire to know upon what ſtatute I am indicted.

Mr. Att. Gen. My lord, I will give as plain an anſwer. You are indicted upon the old ſtatute of 25. *Edw.* III.

Col. Sidney. Then I deſire to know upon what branch of that ſtatute?

Mr. Att. Gen. Why, I will acquaint you, it is upon the firſt branch of that ſtatute, for conſpiring and compaſſing the death of the king.

Col. Sidney. Then I conceive, what does not come within that, does not touch me.

Mr. Att. Gen. Make what inferences you pleaſe, Colonel, we will anſwer you.

Col. Sidney. I deſire to know what the witneſſes have ſworn againſt me upon that point?

Mr. Att. Gen. Go on, you have heard the witneſſes as well as we.

L. C. J. He ſays you are indicted upon the ſtatute of 25 *Edw.* III. which ſtatute makes it high-treaſon to conſpire the death of the king; and the overt-act is ſufficiently ſet forth in the indictment; and now the queſtion is, whether it is proved.

Col. Sidney. They have proved a paper found in my ſtudy of *Caligula* and *Nero*; that is compaſſing the death of the king, is it?

L. C. J. That I ſhall tell the jury. The point of law you are to take from the Court, gentlemen: whether there be fact ſufficient, that is your duty to conſider.

Col. Sidney. I ſay, my lord, that ſince I am indicted upon that ſtatute, I am not to take notice of any other. I am indicted for conſpiring the death of the king, becauſe ſuch a paper is found in my houſe; under favour, I think that can be nothing at all to me. For though Sir *Philip Lloyd* did aſk me, whether I would put my ſeal to it, he did not aſk me till he had been in my cloſet, and I knew not what he had put in, and ſo I told him I would not do it. Then come theſe gentlemen upon ſimilitude of hands. My lord, we know what ſimilitude of hands is in this age. One told me within theſe two days, that one came to him, and offered to counterfeit any hand he ſhould ſhew him in half an hour. So then, my lord, I have nothing to ſay to theſe papers. Then for point of witneſs, I cannot be indicted, much leſs tried or condemned on 25 *Edw.* III. for by that act there muſt be two witneſſes to that very branch unto which the treaſon does relate, which muſt be diſtinguiſhed. For the levying of war, and conſpiring the death of the king are two diſtinct things, diſtinct in nature and reaſon, and ſo diſtinguiſhed in the ſtatute.

tute. And therefore the conſpiring the death of the king is treaſon, and the other not. 1 *Edw.* VI. 12. 5 *Edw.* VI. 11. does expreſly ſay, there muſt be two witneſſes to either of theſe acts. Now here is my Lord *Howard*, (I have enough to ſay of him by and by) it is he only who ſpeaks of ſix men, whom he calls a ſelect council, and yet ſelected by no man in the world. I deſire to know who ſelected my Lord *Howard?* Who ſelected me? If they were ſelected by nobody, it is a bull to ſay they were a ſelect council: if they were not ſelected, but erected themſelves into a cabal, then they have either confidence in one another, or find they are near equally able to aſſiſt in the deſign. Here is nothing of all this,—Theſe ſix men were ſtrangers to one another. For my own part, I never ſpake with the duke of *Monmouth* above three times in my life, and one time was when my Lord *Howard* brought him to my houſe and cozened us both. He told the duke I invited him, and he told me the duke invited himſelf, and neither of them was true. Now that ſuch men as theſe are, not hardly knowing one another, ſhould preſently fall into a great and intimate friendſhip, and truſt and management of ſuch a buſineſs as this is, is a thing utterly improbable, unleſs they were mad. Now I do find in my Lord *Howard's* depoſition againſt my Lord *Ruſſel*, that they were in proſecution of my Lord *Shaftſbury's* deſign; and yet he acknowledges the duke of *Monmouth* ſaid he was mad, and he himſelf ſaid ſo too. Now that they ſhould join with four more in the proſecution of the deſign of a mad-man, they muſt be mad too. Now whether my Lord *Howard* would have you think he was mad, becauſe a mad-man cannot be guilty of treaſon, I cannot tell. My Lord *Howard* in his laſt depoſition at my Lord *Ruſſel's* trial, fixes the two meetings, one about the middle of *January*, the other ten days after: now he fixes one to be the latter end of *January*, the other the middle of *February*. Then he makes it to be the proſecution of my Lord *Shaftſbury's* deſign. I do not find that any one there had any thing to do with my Lord *Shaftſbury*, for my part I had not. I had not ſeen his face in two years. Then, my lord, that I go upon is, whatever my Lord *Howard* is, he is but one witneſs. The law of God and the law of man, underſtood and taken by all men, does require two witneſſes; *Moſes* ſays ſo, ſo the apoſtles the ſame after him, and *Chriſt* ſays the ſame, That every matter is to be eſtabliſhed by two witneſſes. There ought to be two witneſſes to the ſame thing. Now for one to come and tell a tale of a tub, of an imaginary counſel, and ano-

ther of a libel, a paper written no body knows when, is ſuch a thing you can never go over it. But if the law of God be, that there muſt be two witneſſes to the ſame fact, there is an end of this matter. And under the judicial law, the penalty would be in this caſe, to put a man to death. Now here there are but two things, which if allowed of, no body will be ſafe for perjury. The one is to ſuffer men to give their teſtimony, one to one thing, and another to another, that the fraud cannot be diſcovered: and the other is to take away the puniſhment. Now the puniſhment is taken away in ſome meaſure: and do but take away the other point, whereby the fraud cannot be diſcovered; and then there is no defence can be made. That both witneſſes ſhould be to the ſame point; ſee the ſtory of *Suſanna*. Two elders teſtified they ſaw her in the act of adultery: they were carrying of her to death; both of them ſaid the ſame thing; until they were taken aſunder and examined, the fraud was not diſcovered; and then one ſaid, ſhe was under a tree of the right hand, and the other, under the tree on the left; and ſhe eſcaped and they were puniſhed. But now if you apply it to ſeveral facts, my Lord *Howard* may ſay what he pleaſes, and if another ſhall come with a ſupplemental proof, no juſtice can be had. But, my lord, I deſire this, if there be two witneſſes to prove the conſpiracy, and in that there were thoſe matters done that are treaſon, I muſt anſwer to it; but if there be not, I preſume I need ſay nothing to it. If you do not allow it me, I deſire counſel to argue it.

L. C. J. That is a point of fact, whether there be two witneſſes. I tell you before-hand, one witneſs is not ſufficient.

Col. Sidney. Why then there is my Lord *Howard*, and never another.

L. C. J. Nay, do not make thoſe inferences; I will tell the jury, if there be not two witneſſes, as the law requires in this caſe, they ought to acquit you.

Col. Sidney. You confound me, I cannot ſtir. You talk of a conſpiracy; what is a conſpiracy to kill the king? Is there any more witneſſes than one for levying of war?

L. C. J. Pray do not deceive yourſelf; you muſt not think the Court and you intend to enter into a dialogue. Anſwer to the fact; if there be not ſufficient fact, the jury will acquit you. Make what anſwer you can to it.

Col. Sidney. Then I ſay, there being but one witneſs, I am not to anſwer to it at all.

L. C. J.

L. C. J. If you rely upon that, we will direct the jury preſently.

Col. Sidney. Then for levying war, what does any one ſay? My Lord *Howard*, let him, if he pleaſe reconcile what he has ſaid now, with what he ſaid at my Lord *Ruſſel's* trial. There he ſaid, he ſaid all he could; and now he has got I do not know how many things that were never ſpoken of there. I appeal to the Court, whether he did then ſpeak one word of that, that he now ſays of Mr. *Hampden*. He ſets forth his evidence very rhetorically, but it does not become a witneſs, for he is only to tell what was done and ſaid, but he does not tell what was done and ſaid. He ſays, they took upon them to conſider, but does not ſay what one man ſaid, or what one man reſolved, much leſs what I did. My lord, if theſe things are not to be diſtinguiſhed, but ſhall be jumbled all up together, I confeſs I do not know what to ſay.

L. C. J. Take what liberty you pleaſe. If you will make no defence, then we will direct the jury preſently. We will direct them in the law, and recollect matter of fact as well as we can.

Col. Sidney. Why then, my lord, I deſire the law may be reſerved to me, I deſire I may have counſel to that point of there being but one witneſs.

L. C. J. That is a point of fact. If you can give any teſtimony to diſparage the witneſs, do it.

Col. Sidney. I have a great deal to that.

L. C. J. Go on to it then.

Col. Sidney. Then, my lord, was there a war levied? or was it prevented? Why then, if it be prevented, it is not levied; if it be not levied, it is not within the ſtatute; ſo this is nothing to me.

L. C. J. The Court will have patience to hear you; but at the ſame time I think it is my duty to advertiſe you, that this is but miſpending of your time. If you can anſwer the fact, or if you have any mind to put any diſparagement upon the witneſſes; that they are perſons not to be believed, do it, but do not aſk us queſtions this way or the other.

Col. Sidney. I have this to ſay concerning my Lord *Howard*: he hath accuſed himſelf of divers treaſons, and I do not hear that he has his pardon of any: he is under the terror of thoſe treaſons, and the puniſhment for them: he hath ſhewn himſelf to be under that terror: he hath ſaid, that he could not get his pardon, until he had done ſome other jobs, till he was paſt this drudgery of ſwearing: that is, my lord, that he having incurred the penalty of high-

high-treaſon, he would get his own indemnity by deſtroying others. This by the law of God and man, I think, deſtroys a man's teſtimony. Beſides, my lord, he is my debtor, he owes me a conſiderable ſum of money I lent him in time of his great neceſſity; he made ſome covenants with me for the payment of that money, which he hath broken; and when his mortgage was forfeited, and I ſhould take the advantage the law gives me, he finds out a way to have me laid up in the *Tower:* he is a very ſubtle man: at my Lord *Ruſſel's* trial, he carried his knife, he ſaid, between the paring and the apple; and ſo this is a point of great nicety and cunning, at one time to get his own pardon, and at the ſame time to ſave his money. Another thing, my lord, is, when I was a priſoner, he comes to my houſe, and ſpeaks with my ſervant, and ſays, how ſorry he was that I ſhould be brought in danger upon this account of the plot, and there he did in the preſence of God, with hands and eyes lifted up to heaven, ſwear he did not believe any plot, and that it was but a ſham; and that he was confident if I had known any thing, I would have told it him. He hath ſaid ſomewhat of this before, I have ſeveral witneſſes to prove both. He was deſirous to go further, and he would not only pay my debt by his teſtimony againſt me, but he would have got my plate and other goods in my hands into his hands, and he deſired my men, as a place of truſt, to put them into his hands. And the next news was, that there was a warrant againſt my Lord *Ruſſel* and me. But then, my lord, he made other affirmations in the ſame preſence of God, that I was innocent in his opinion, and he was confident of it; for if he had known any thing of it, he would have told it. Now I know, in my Lord *Ruſſel's* caſe, there was Dr. *Burnet* ſaid ſomething like it. And when he came to anſwer it, he ſaid he was to face it out, and make the beſt of it he could. Now he did face it out bravely againſt God, but he was very timorous of man. So that, my lord, he does ſay at the ſame time, at my Lord *Ruſſel's* trial, upon his oath, that he did believe that the religious obligation of an oath, did not conſiſt in the formality of applying it to the place, &c. but in calling God to witneſs. So that when he did call God to witneſs before Dr. *Burnet* and my ſervant, and others, and this is not conſiſtent with the oath he has taken here, as the gentleman ſaid at my Lord *Ruſſel's* trial, unleſs he has one ſoul in Court, and had another at my houſe, theſe things are inconſiſtent, and cannot be true; and if he ſwear both under the religion

of

of an oath, he ſwears himſelf perjured. Then, my lord, he talks of *Aaron Smith;* what have I to do with *Aaron Smith?* He ſays, I ſent him; my lord, there is nobody elſe ſpeaks a word of it. Then by a ſtrange kind of conſtruction and imagination, they will have it, that ſome papers here, which are ſaid to be found in my ſtudy, have relation to this plot, as they call it; I know of none, nor am in none. Now, my lord, I am not to give an account of theſe papers, I do not think they are before you, for there is nothing but the ſimilitude of hands offered for proof. There is the like caſe of my Lady *Carr* ſome few years ago: ſhe was indicted of perjury, and as evidence againſt her, ſome letters of hers were produced, that were contrary to what ſhe ſwore in *Chancery*, and her hand was proved; that is to ſay, it was like it: but my Lord Chief Juſtice *Keiling* directs the jury, that though in civil cauſes it is a proof, yet it is the ſmalleſt and leaſt of proofs; but in criminal caſes it was none at all. So that my Lord *Howard's* teſtimony is ſingle; and what he talks of thoſe two buſineſſes that he calls a conſult, and *Aaron Smith*, is deſtroyed by want of proof. What could ſix men do? Can my Lord *Howard* raiſe five men by his credit? By his purſe? Let him ſay as much for me, with all my heart; for my part, I do not know where to raiſe five men. That ſuch men as we are, that have no followers, ſhould undertake ſo vaſt a deſign, is very unlikely: and this great deſign that was carried on thus, it had neither officers nor ſoldiers, no place, no time, no money for it. That which he ſaid laſt time, which he forgot now, he talked of twenty-five, or thirty thouſand pounds, but no man knew where it was to be had, but laſt time he ſaid, it was ſpoken in jeſt. Now this is a pretty cabal, that ſix men ſhould meet about a buſineſs, and they neglect every one of the points relating to the thing they met about, make no ſtep about the buſineſs, and if any one did ſpeak of it, it was but in jeſt. This is a very deep maintaining of the plot. Then, my lord, as to theſe papers, I do not think I am to give any account of them, I would ſay nothing to the diſparagement of Sir *Philip Lloyd*, I never ſaw him till he came to my houſe, but yet I ſay he is the king's officer, and when I am proſecuted at the king's ſuit, I think he ought to be no witneſs. The government of *France* is violent and abſolute, but yet a few years ago, a miniſter of ſtate had his papers taken from him, and abundance of them had dangerous plots againſt the king in them; but becauſe they were inventoried in his officers preſence, or thoſe deputed by

by him, there was no uſe could be made of them, it was an irreparable fault in the proceſs, and that ſaved him. The ſimilitude of hands is nothing: we know that hands will be counterfeited, ſo that no man ſhall know his own hand. A gentleman that is now dead, told me, that my Lord *Arlington* about five years ago, deſired him to write a letter, and ſeal it as well as he could; he writ it with care, and ſealed it with a wafer and wax upon it, and within a few days, my Lord *Arlington* brought him five letters, and he did not know which was his own. The attorney ſhews theſe papers to me, I do not know whether they are my own or no; but theſe very papers, ſuch as they are, do abhor, as much as any one can, ſuch a deſign. Look upon them, you ſee they are all old ink. Theſe papers may be writ, perhaps, theſe twenty years, the ink is ſo old. But my lord, it is a polemical diſcourſe, it ſeems to be an anſwer to *Filmar*, which is not calculated for any particular government in the world: it goes only upon theſe general principles, that according to the univerſal law of God and nature, there is but one government in the world, and that is intire and abſolute; and that the king can be bound by no law, by no oath, but he may make all laws, and aboliſh them as he pleaſes: and this whether of age or no, a man, or a child of ſenſe, or out of his ſenſe. Now, my lord, what if any man in his cabinet ſhould have written this book? Then he has another principle, he ſays, it is the ſame thing whether a king come in by election, by donation, by inheritance, or uſurpation, or any other way; than which, I think, never was a thing more deſperately ſaid. *Cromwel*, when one *White*, a prieſt, wrote a book, wherein he undertook to prove, "That poſſeſſion was the only right to power," though he was a tyrant, and a violent one, (you need not wonder I call him tyrant, I did ſo every day in his life, and acted againſt him too) it would be ſo odious a principle, he would not endure it, and he uſed him very ſlightly for it. Now this *Filmar*, that no man muſt write againſt, is the man that does aſſert it, that it is no matter how they come by their power, and gives the ſame power to the worſt uſurpers, as they that moſt rightly come to the crown. By the ſame argument, if the arranteſt raſcal of *Iſrael* had killed *Moſes*, *David*, &c. and ſeized upon the power, he had been poſſeſſed of that power, and been father of the people. If this be doctrine, my lord, that is juſt and good, then I confeſs it may be dangerous for any thing to be found in a man's houſe contrary to it; but if a Commoner of *England* write his preſent thoughts,

and another man looking on his book writes his preſent thoughts of it, what great hurt is there in it? and I aſk Mr. Attorney how many years ago that was written.

L. C. J. I do not know what the book was in anſwer to. We are not to ſpeak of any book that Sir *Robert Filmar* wrote, but you are to make your defence, touching a book that was found in your ſtudy, and ſpend not your time, and the Court's time, in that which ſerves to no other purpoſe, than to gratify a luxuriant way of talking that you have. We have nothing to do with his book, you had as good tell me again, that there was a parcel of people rambling about, pretending to my lord *Ruſſel*'s ghoſt, and ſo we may anſwer all the comedies in *England*. Anſwer to the matter you are indicted for. Do you own that paper?

Col. Sidney. No, my lord.

L. C. J. Go on then, it does not become us to be impatient to hear you, but we ought to advertiſe you, that you ſpend your time to no purpoſe, and do yourſelf an injury.

Col. Sidney. I ſay firſt, it is not proved upon me: and ſecondly, it is not a crime if it be proved——

L. C. J. You began very materially in one thing; it is material for you to apply yourſelf to take off the credibility of my lord *Howard*, that is a witneſs; call your witneſſes to that purpoſe, or if you have any other point to take away the credibility of any other witneſs.

Col. Sidney. My lord, I have ſeven or eight points of law.

L. C. J. I hear not one yet.

Col. Sidney. Why, my lord, conſpiring to levy war is not treaſon, and I deſire to have counſel upon that.

L. C. J. It is not a queſtion. You had as good aſk me, whether the firſt chapter in *Littleton* be law.

Col. Sidney. My lord, I have neither made war nor conſpired to levy war.

L. C. J. You are ſtill in a miſtake; you ſhall not think that we intend to dialogue with you, to let you know how far the proof hath been given or not given, but when we come to direct the jury, then we ſhall obſerve how far the law requires there ſhould be two witneſſes. But whether there be ſuch a proof, that muſt be left to the jury.

Mr. Juſt. Withins. If you agree the conſpiracy, I will tell you my mind of it; I cannot give you my opinion in law, till the fact be ſtated.

L. C. J. The law always ariſes upon a point of fact; there

there can be no doubt in point of law, till there be a ſettlement in point of fact.

Mr. Juſt. Holloway. My lord has put you in a right way: the conſpiracy is proved but by one witneſs, if you have any thing to take off his credibility, it is to the purpoſe.

Col. Sidney. Truly, my lord, I do as little intend to miſſpend my own ſpirit, and your time, as ever any man that came before you. Now, my lord, if you will make a concatenation of one thing, a ſuppoſition upon ſuppoſition, I would take all this aſunder, and ſhew, if none of theſe things are any thing in themſelves, they can be nothing joined together.

L. C. J. Take your own method, Mr. *Sidney;* but I ſay, if you are a man of low ſpirits and weak body, it is a duty incumbent upon the Court, to exhort you not to ſpend your time upon things that are not material.

Col. Sidney. My lord, I think it is very meterial, that a whimſical imagination of a conſpiracy ſhould not paſs for a real conſpiracy of the death of the king; beſides, if theſe papers were found in my houſe, it is a crime created ſince my impriſonment, and that cannot come in, for they were found ſince. My lord, if theſe papers are right, it mentions 200 and odd ſheets, and theſe ſhew neither beginning nor ending; and will you, my lord, indict a man for treaſon for ſcraps of paper found in his houſe, relating to an ancient paper, intended as innocently as any thing in the world, and piece and patch this to my lord *Howard*'s diſcourſe, to make this a contrivance to kill the king? Then, my lord, I think it is a right of mankind, and it is exerciſed by all ſtudious men, that they write in their own cloſets what they pleaſe for their own memory, and no man can be anſwerable for it, unleſs they publiſh it.

L. C. J. Pray do not go away with that right of mankind, that it is lawful for me to write what I will in my own cloſet, unleſs I publiſh it: I have been told, curſe not the king, not in thy thoughts, not in thy bed-chamber, the birds of the air will carry it. I took it to be the duty of mankind, to obſerve that.

Col. Sidney, I have lived under the inquiſition——

L. C. J. God be thanked we are governed by law.

Col. Sidney. I have lived under the inquiſition, and there is no man in *Spain* can be tried for hereſy———

Mr. Juſt. Withins. Draw no precedents from the inquiſition, here, I beſeech you, Sir.

L. C. J. We muſt not endure men to talk, that by the right of nature every man may contrive miſchief in his own chamber

chamber, and he is not to be puniſhed, 'till he thinks fit to be called to it.

Col. Sidney. My lord, if you will take ſcripture by pieces, you will make all the penmen of the ſcripture blaſphemous; you may accuſe *David* of ſaying, there is no God; and accuſe the evangeliſts of ſaying, Chriſt was a blaſphemer and a ſeducer; and the apoſtles, that they were drunk.

L. C. J. Look you, Mr. *Sidney*, if there be any part of it that explains the ſenſe of it, you ſhall have it read; indeed we are trifled with a little. 'Tis true in ſcripture 'tis ſaid, there is no God, and you muſt not take that alone, but you muſt ſay, the fool hath ſaid in his heart there is no God. Now there is a thing imputed to you in the libel; if you can ſay, there is any part that is in excuſe of it, call for it. As for the purpoſe, whoſoever does publiſh, that the king may be put in chains or depoſed, is a traitor; but whoſoever ſays, that none but traitors would put the king in chains, or depoſe him, is an honeſt man; therefore apply *ad idem*, but do not let us make excurſions.

Col. Sidney. If they will produce the whole, my lord, then I can ſee whether one part contradicts another.

L. C. J. Well, if you have any witneſſes call them.

Then the priſoner called his witneſſes; and the lord *Clare*, the lord *Angleſey*, Mr. *Howard*, Dr. *Burnet*, and ſeveral more, depoſed, that they had heard the lord *Howard* ſay, in the moſt ſolemn manner, that the priſoner was innocent; and that he knew nothing of a plot: to which the Attorney General anſwered, Would not any man have ſaid as much, that had been in a plot?

L. C. J. Have you any more witneſſes?

Col. Sidney. No, my lord.

L. C. J. Then apply yourſelf to the jury.

Col. Sidney. Then this is that I have to ſay. Here is a huge complication of crimes laid to my charge: I did not know at firſt under what ſtatute they were, now I find it is the ſtatute of 25 *Edw.* III. This ſtatute hath two branches; one relating to war, the other to the perſon of the king. That relating to the perſon of the king, makes the conſpiring, imagining and compaſſing his death, criminal. That concerning war is not, unleſs it be levied. Now, my lord, I cannot imagine to which of theſe they refer my crime, and I did deſire your lordſhip to explain it. For to ſay that a man did meet to conſpire the king's death, and he that give you the account of the buſineſs does not ſpeak one word of it, ſeems extravagant; for conſpiracies have ever their denomination from that point to which

which they tend; as a conſpiracy to make falſe coin infers inſtruments and the like. A conſpiracy to take away a woman, to kill or rob, are all directed to that end. So conſpiring to kill the king, muſt immediately aim at killing the king. The king hath two capacities, natural and politick, that which is the politick cannot be within the ſtatute, in that ſenſe he never dies, and it is abſurd to ſay it ſhould be a fault to kill the king that cannot die: ſo then it muſt be the natural ſenſe it muſt be underſtood in, which muſt be done by the ſword, by piſtol, or any other way. Now if there, be not one word of this, then that is utterly at an end, though the witneſs had been good. The next point is concerning levying of war. Levying of war is made treaſon there ſo it be proved by overt-act; but an overt-act of that never was, or can be pretended here. If the war be not levied, it is not within the act, for conſpiring to levy war is not in the act. My lord, there is no man that thinks that I would kill the king that knows me, I am not a man to have ſuch a deſign, perhaps I may ſay I have ſaved his life once. So that it muſt be by implication, that is, it is firſt imagined that I intended to raiſe a war, and then it is imagined that war ſhould tend to the deſtruction of the king. Now I know that may follow, but that is not natural or neceſſary, and being not natural or neceſſary, it cannot be ſo underſtood by the law. That it is not, is plain, for many wars have been made, and the death of the king has not followed. *David* made war upon *Saul*, yet no body will ſay he ſought his death, he had him under his power and did not kill him; *David* made war upon *Iſhboſheth*, yet did not deſign his death: and ſo in *England* and *France* kings have been taken priſoners, but they did not kill them. King *Stephen* was taken priſoner, but they did not kill him. So that it is two diſtinct things, to make war and to endeavour to kill the king. Now as there is no manner of pretence that I ſhould endeavour to kill the king directly, ſo it cannot be by inference, becauſe it is treaſon under another ſpecies: I confeſs I am not fit to argue theſe points, I think I ought to have counſel, but if you will not allow it me, I cannot help it; but theſe things are impoſſible to be jumbled up together. Now I ſay this, if I am not under the firſt branch, if not directly, I cannot be by implication; though I did make war, I cannot be ſaid to conſpire the death of the king, becauſe it is a diſtinct ſpecies of treaſon; and my lord *Coke* ſays, it is the overthrow of all juſtice to confound *Membra dividentia*. Now if the making of war cannot be underſtood to be a conſpiring the death of the king,

king, then I am not guilty of this indictment; but here, my lord, is neither conſpiring the death of the king, nor making war, nor conſpiring to make war. Beſides, I ſay, it is not the beſt man's evidence here would be good in this caſe, becauſe the law requires two. The next thing is the buſineſs of *Aaron Smith*, which my lord tells ſo imperfectly, and ſo merely conjectural, that there is nothing in it but his rhetorick in ſetting it out. He tells you of a letter ſent with him, but he does not tell you by whom writ, what was in it, or whether it was delivered or no; ſo that I think we may lay that aſide as the other, as things nothing in them at all. Then ſays Mr Attorney, Theſe *Scotch* gentlemen are come to town, I profeſs I never heard the names of one of them till he named them to me in the *Tower*. I have not ſent myſelf, nor writ a letter into *Scotland* never ſince the year 59, nor do I know one man in *Scotland* to whom I can write, or from whom I ever received one. I returned into *England* in the year 77, and ſince that time have not writ nor received a letter from *Scotland*. Then ſome gentlemen came hither, what is that to me? I never ſaw one of the *Campbels* in my life, nor *Monro*: if any one can prove I have had any communication with them, I will be glad to ſuffer. Then here are papers, if any thing is to be made of them, you muſt produce the whole, for it is impoſſible to make any thing of a part of them. You aſk me, what other paſſage I would have read, I do not know a paſſage in them, I cannot tell whether it be good or bad. But if there are any papers found, it is a great doubt whether they were found in my ſtudy or no, or whether they be not counterfeit; but though that be admitted, that they were found in my houſe, the hand is ſuch, that it ſhews they have been writ very many years. Then that which ſeems to be an account of the ſections and chapters, that is but a ſcrap, and what if any body had, my lord, either in my own hand or another's, found papers that are not well juſtifiable, is this treaſon? does this imagine the death of the king? If any man can ſay I ever printed a ſheet in my life, I will ſubmit to any puniſhment. Many others, my lord, they write, and they write what comes into their heads. I believe there is a brother of mine here has forty quires of paper written by my father, and never one ſheet of them was publiſhed, but he writ his own mind to ſee what he could think of it another time, and blot it out again, may be. And I myſelf, I believe, have burned more papers of my own writing than a horſe can carry. So that for theſe papers I cannot anſwer for them.

them. There is nothing in it, and what concatenation can this have with the other deſign that is in itſelf nothing, with my lord's ſelect council ſelected by nobody to purſue the deſign of my Lord *Shafiſbury?* And this council that he pretends to be ſet up for ſo great a buſineſs, was to be adjuſted with ſo much fineneſs ſo as to bring things together, What was this fineneſs to do? (taking it for granted, which I do not.) This was nothing (if he was a credible witneſs) but a few men talking at large of what might be or not be, what was like to fall out without any matter of intention, or doing any thing; they did not ſo much as enquire, whether there were men in the country, arms, or ammunition. A war to be made by five or ſix men, not knowing one another, nor truſting one another. What ſaid Dr. *Coxe* in his evidence at my Lord *Ruſſel's* trial, of my Lord *Ruſſel's* truſting my Lord *Howard?* He might ſay the ſame of ſome others. So that, my Lord, I ſay, theſe papers have no manner of coherence, no dependence upon any ſuch deſign. You muſt go upon conjecture upon conjecture; and after all, you find nothing but only papers, never perfect, only ſcraps, written many years ago, and that could not be calculated for the raiſing of the people. Now, pray, what imagination can be more vain than that? And what man can be ſafe, if the king's counſel may make ſuch (whimſical I will not ſay, but) groundleſs conſtructions? Mr. *Attorney* ſays, the plot was broken to the *Scots*, (God knows we were neither broken nor joined) and that the *Campbels* came to town about that time I was taken; and in the mean time my Lord *Howard*, the great contriver of all this plot, who was moſt active, and adviſed the buſineſs that conſiſted of ſo much fineneſs, he goes there and agrees of nothing, and then goes into *Eſſex* upon great important buſineſs, greater than the war of *England* and *Scotland*, to what purpoſe? To look after a little pimping manor, and what then? Why then it muſt be laid aſide, and he muſt be idle five weeks at the *Bath*, and there is no enquiring after it. Now, I deſire your lordſhip to conſider, whether there be a poſſibility for any men, that have the ſenſe of porters and grooms, to do ſuch things as he would put upon us. I would only ſay this; if Mr. Attorney be in the right, there was a combination with the *Scots*, and then this paper was writ; for thoſe that ſay I did it, ſay I was doing of it then; and by the notes, there is work enough for four or five years, to make out what is mentioned in thoſe ſcraps of paper, and this muſt be to kill the king. And I ſay this, my lord, that under favour,

vour, for all conſtructive treaſons you are to make none, but to go according to plain proof, and that theſe conſtructive treaſons belong only to parliament, and by the immediate proviſo in that act. Now, my lord, I leave it to your lordſhip, to ſee whether there is in this any thing that you can ſay is an overt-act of treaſon mentioned in 25 *Edw.* III. If it be not plainly under one of the two branches, that I have endeavoured to kill the king, or levied war, then it is matter of conſtruction, and that belongs to no Court but the parliament. Then, my lord, this hath been adjudged already in *Throgmorton's* caſe. There are twenty judgments of parliament, the act of 13 *Eliz.* that ſays—I ſhould have ſomebody to ſpeak for me, my lord.

L. C. J. We are of another opinion.

Mr. Juſt. Withins. If you acknowledge the matter of fact, you ſay well.

Col. Sidney. I ſay there are ſeveral judgments of parliament, that do ſhew whatever is conſtructive treaſon does not belong to any private Court. That of 1 *Mary*, 1 *Edw.* VI. 1 *Eliz.* 5 *Eliz.* 18. another 13 *Car.* ſhews this. Now, my lord, I ſay that the buſineſs concerning the papers, it is only a ſimilitude of hands, which is juſt nothing. In my lady *Carr's* caſe, it was reſolved to extend to no criminal cauſe; if not to any, then not to the greateſt, the moſt capital. So that I have only this to ſay, that I think it is impoſſible for the jury to find this matter; for the firſt point you proved by my Lord *Howard*, that I think is nobody, and the laſt concerning the papers, is only imagination from the ſimilitude of hands. If I had publiſhed it, I muſt have anſwered for it; or if the thing had been whole and mine, I muſt have anſwered for it; but for theſe ſcraps never ſhewed any body, that I think does not at all concern me. And I ſay, if the jury ſhould find it (which is impoſſible they can) I deſire to have the law reſerved unto me.

Mr. Sol. Gen. My lord, and you gentlemen of the jury, the evidence hath been long; but I will endeavour to repeat it as faithfully as I can. The crime the priſoner ſtands accuſed for, is compaſſing and imagining the death of the king. That which we go about to prove that compaſſing and imagining by, is by his meeting and conſulting how to raiſe arms againſt the king, and by plain matter in writing under his own hand, where he does affirm, it is lawful to take away and deſtroy the king. Gentlemen, I will begin with the firſt part of it, the meeting and conſultation to raiſe arms againſt the king. The priſoner, gentlemen,

hath endeavoured to avoid the whole force of this evidence, by ſaying, that this in point of law cannot affect him, if it were all proved; for this does not amount to a proof of his compaſſing and imagining the death of the king, and he is very long in interpreting the act of parliament to you of 25 *Edw.* III. and dividing of it into ſeveral members or branches of treaſon, and does inſiſt upon it, that though this ſhould be an offence within one branch of that ſtatute, yet that is not a proof of the other, which is the branch he is proceeding upon, that is the firſt clauſe againſt the compaſſing and imagining the death of the king. And, ſays he, conſpiring to levy war is not ſo much as one branch of that ſtatute, but it muſt be war actually levied. This is a matter he was wholly miſtaken in, in point of law. It hath been adjudged over and over again, That an act which is in one branch of that ſtatute, may be an overt-act to prove a man guilty of another branch of it. A levying war is an overt-act to prove a man guilty of conſpiring the death of the king. And this was adjudged in the caſe of Sir *Henry Vane*, ſo is meeting and conſulting to raiſe arms; and reaſon does plainly ſpeak it to be ſo; for they that conſpire to raiſe war againſt the king, cannot be preſumed to ſtop any where, till they have dethroned or murdered the king. Gentlemen, I will not be long in citing authorities, it hath been ſettled lately by all the judges of *England*, in the caſe of my Lord *Ruſſel*, who hath ſuffered for this conſpiracy. Therefore that point of law will be very plain againſt the priſoner. He hath mentioned ſome other things, as that there muſt be two witneſſes to every particular fact, and one witneſs to one fact, and another to another, is not ſufficient; it hath been very often objected, and as often over-ruled: it was over-ruled ſolemnly in the caſe of my Lord *Stafford*. Therefore if we have one witneſs to one overt-act, and another to another, they will be two witneſſes in law to convict the priſoner. In the firſt part of our evidence, we give you an account of the general deſign of an inſurrection that was to have been, that this was contrived firſt, when my Lord *Shaftſbury* was in *England*, that after my Lord *Shaftſbury* was gone, the buſineſs did not fall, but they thought fit to revive it again, and that they might carry it on the more ſteadily, they did contrive a council among themſelves of ſix, whereof the priſoner at the bar was one. They were the Duke of *Monmouth*, my Lord of *Eſſex*, my Lord *Howard*, my Lord *Ruſſel*, the priſoner at the bar, and Mr. *Hampden*. This council they contrived to manage this affair, and to carry on

that

that deſign, that ſeemed to fall by the death of my Lord of *Shaftſbury*, and they met; this we give you an account of, firſt by witneſſes, that gave you an account in general of it. And though they were not privy to it, yet they heard of this council, and that Colonel *Sidney* was to be one of this counſel. This, gentlemen, if it had ſtood alone by itſelf, had been nothing to affect the priſoner at all. But this will ſhew you, that it was diſcourſed among them that were in this conſpiracy. Then my lord *Howard* gives you an account, that firſt the duke of *Monmouth*, and he and Colonel *Sidney* met, and it was agreed to be neceſſary to have a council that ſhould conſiſt of ſix or ſeven, and they were to carry it on. That the duke of *Monmouth* undertook to diſpoſe my lord *Ruſſel* to it, and Colonel *Sidney* to diſpoſe the earl of *Eſſex*, and Mr. *Hampden*; that theſe gentlemen did meet accordingly, and the ſubſtance of their diſcourſe was, taking notice how the deſign had fallen upon the death of my lord *Shafiſbury*, that it was fit to carry it on before men's inclinations were cool, for they found they were ready to it, and had great reaſon to believe it, becauſe this being a buſineſs communicated to ſo many, yet for all that it was kept very ſecret, and nobody had made any mention of it, which they looked upon as a certain argument that men were ready to engage in it. This encouraged them to go on in this conſpiracy. Then when the ſix met at Mr. *Hampden*'s houſe, they debated concerning the place of riſing, and the time, the time they conceived muſt be ſuddenly before men's minds were cool, for now they thought they were ready and very much diſpoſed to it; and for place they had in debate, whether they ſhould riſe firſt in town, or in the country, or both together. And for the perſons, they thought it abſolutely neceſſary for them to have the united councils of *Scotland* to join with them, and therefore they did refer this matter to be better conſidered of another time, and they met afterwards at my lord *Ruſſel*'s houſe in *February*, and there they had diſcourſe to the ſame purpoſe. But there they began to conſider with themſelves, being they were to deſtroy the government, what they ſhould ſet up in the room of it, to what purpoſe they engaged. For they did very wiſely conſider if this be only to ſerve a turn, and to make one man great, this will be a great hinderance in their affair, therefore they thought it was neceſſary to engage upon a publick account, and to reſolve all into the authority of parliament, which ſurely they either thought to force the king to call, or otherwiſe that the people might call a parliament, if the king refuſed, and ſo they to chooſe

their own heads. But ſtill they were upon this point, that it was neceſſary for their friends in *Scotland* to have their councils united with them, and in order to that, it was neceſſary to contrive ſome way to ſend a meſſenger into *Scotland*, to bring ſome men here to treat and conſult about it, and Colonel *Sidney* is the man that does engage to ſend this meſſenger, and he had a man very fit for his turn, that is, *Aaron Smith*, whom he could confide in, and him he undertook to ſend into *Scotland*. This meſſenger was to fetch my lord *Melvin*, the two *Campbells*, and Sir *John Cockram*; Colonel *Sidney*, as he engaged to do this, ſo afterwards he did ſhew to my lord *Howard* money, which he affirmed was for that buſineſs; he ſays it was a ſum of about ſixty guineas, and he believes he gave it him, for that Colonel *Sidney* told him, *Aaron Smith* was gone into *Scotland*, that the pretence was not barefaced to invite them over, to conſult of a rebellion, but to conſult about the buſineſs of *Carolina*, being the plantation for the perſecuted brethren, as they pretended, in *Scotland*. Gentlemen, theſe *Scotchmen* that were thus ſent for over, they came accordingly, that is, the two *Campbells*, and Sir *John Cockram*; and the diſcourſe with Sir *Andrew Foſter* was according to this cant that was agreed on beforehand, concerning a plantation in *Carolina*. This was that that was pretended for their coming hither; but the true errand was the buſineſs of the inſurrection intended. Gentlemen, that they came upon ſuch a deſign, is evident from the circumſtances; they came about the time the buſineſs brake out, and in that time ſuſpiciouſly changing their lodging, they were taken making their eſcape, and this at a time before it was probably to be known abroad that theſe men were named as part of the conſpirators. Theſe things do very much verify the evidence my lord *Howard* hath given, and there is nothing has been ſaid, does at all invalidate it. The ſending of *Aaron Smith* into *Scotland*, and his going, and the coming of theſe men, and their endeavouring to make their eſcape, are mighty concurrent evidences with the whole evidence my lord *Howard* has given. Now, what objections are made againſt this evidence? Truly none at all. Here are perſons of great quality have given their teſtimony, and they do not impeach my lord *Howard* in the leaſt; but ſome do extremely confirm the truth of my lord *Howard*. My lord *Angleſey* gives you an account of a diſcourſe at my lord of *Bedford*'s, that my lord *Howard* came in, and that my lord *Howard* ſhould there comfort my lord of *Bedford*, and enlarge in the commendations of his ſon, and ſay he was confident he knew nothing of the deſign, and he muſt be innocent

cent. Gentlemen, this is the nature of the moſt part of the evidence. My lord of *Clare*, his evidence is much the like, that is, his denying that he knew of any plot. Now here is my lord *Howard* under a guilt of high-treaſon; for he was one of thoſe conſpirators not yet diſcovered, nor no evidence of any diſcourſe leading to any thing that ſhould give occaſion to him to proteſt his innocency: and ſays he, I know nothing of the plot. You would have wondered if he ſhould have been talking in all places his knowledge, and declaring himſelf: his denying of it under the guilt, when he was not accuſed, is nothing to his confeſſion when he comes to be apprehended and taken for it. Here Mr. *Philip Howard* ſays, he had ſeveral diſcourſes with him about this buſineſs, upon the breaking out of the plot, and that he adviſed him to make an addreſs, and that this was a thing that would be very acceptable, and very much for their vindication; and my lord *Howard* (he ſays) thanked him for his very good advice, and ſaid, he would follow it: and preſently after when my lord *Ruſſel* was apprehended, Mr. *Howard* tells him the news, that my lord *Ruſſel* was apprehended; this was ſudden to him. And what ſays he? We are all undone. When my lord *Ruſſel* that was one of this council, that was a ſecret council, and could not be traced but by ſome of themſelves, when he is apprehended, then he falls out into this expreſſion, "We are all undone." This is an argument my lord *Howard* had guilt upon him. For, why were they all undone, that my lord *Ruſſel* was apprehended, any more than upon apprehending the reſt? Yes, becauſe my lord was one of the ſix, and now it was come to the knowing of that part of the conſpiracy. It was traced to the council of ſix, which in all likelihood would break the neck of the deſign. Now though he put it off afterwards, ſaying, "I believe it a ſham plot," yet this was but a trivial put-off. And then, when Colonel *Sidney* is taken, the ſame witneſs Mr. *Howard* tells you, my lord was very ſad and melancholy; for then he had greater reaſon to lie under an apprehenſion of being detected. Therefore, gentlemen, this will rather confirm the truth of the evidence, than any way impeach it. Then (for I would repeat it all, though I think it had no great weight in it) Dr. *Burnet* ſays, that after the plot my lord *Howard* pretended he knew of no plot. This is no more than was teſtified by the other lords before; and all it imports, is, that my lord did not diſcover himſelf to Dr. *Burnet*. But I would fain know, if my lord had told Dr. *Burnet*, had it not argued that he had great confidence in him, that he

he thought him a man fit to be intruſted with ſuch a ſecret? And unleſs the Doctor deſires to be thought ſuch a man, himſelf muſt own it is no objection, that my lord *Howard* did not tell him. *Ducas*'s teſtimony is no more neither, that he proteſted he was innocent, and believed Colonel *Sidney* was innocent; and this was before my lord *Howard* diſcovered any thing of this plot. Then Colonel *Sidney* objects, this is by malice, my lord *Howard* owes him money, and ſeeks to pay his debts by taking away his life; and in further proſecution of this malice, would have ſeized upon his goods. But the evidence does not receive ſuch conſtruction, for my lord *Howard* only offered Colonel *Sidney* the civility of his houſe to protect his plate and goods. Now gentlemen, there were two other witneſſes, my lord *Paget* and Mr. *Edward Howard*; but they ſay no more than the reſt of them, that he did proteſt his innocency, and Mr. *Howard* ſays, he adviſed him to make an addreſs to the king. This, gentlemen, I repeat, not that it is meterial, but for no other reaſon, than becauſe Colonel *Sidney* had produced it; and ſo we are to think, he intended to make ſome uſe of it; but I cannot ſee any inference to be drawn from it. There is one witneſs more, and that is Mr. *Blake*, to the credit of my lord *Howard*, who comes here, and ſays, that when he diſcourſed about a pardon, my lord ſhould ſay, that he had a warrant for his pardon, but that he had not yet paſſed it, and could not yet; and he apprehended the reaſon was, becauſe the drudgery of ſwearing was not over. But this is what my lord *Howard* had conjectured: Firſt, It does not appear that there is any promiſe of pardon at all to my lord *Howard*, on any terms impoſed on him. In the next place, whatever expectation he has of a pardon, he cannot reaſonably hope for it without making a clear diſcovery of all he knows: for to ſtifle the evidence he has given, is not a way to deſerve a pardon of his prince. Therefore, gentlemen, whatever expreſſions were uſed, though he called it the drudgery of ſwearing, however unwilling he is to come to it, and though he gives it very many hard names, and might think it very harſh to come and own himſelf to be one of the conſpirators, it might be irkſome, and very irkſome; yet none of them tell you, that my lord *Howard* ſhould ſay, that what he ſaid was not true. Now he has come and given his evidence, and you have heard all theſe objections againſt it, and not one of them touch it in the leaſt.

I come in the next place to the other part of the evidence, the papers found in Colonel *Sidney*'s houſe. And in the firſt place he objects, they cannot affect him; for ſays he,

he, there is no proof they were found in my houſe, no proof they were writ by me; for compariſon of hands, that is nothing; and if they were proved to be mine, it is nothing at all to the purpoſe; they are an anſwer to a polemical diſcourſe, wherewith he entertained himſelf privately in his ſtudy. Why, you have obſerved, I know, that Sir *Philip Lloyd* in the firſt place ſwears, that by warrant from the ſecretary he ſearched his houſe, and he found the papers lying upon Colonel *Sidney*'s table in his ſtudy, when he came in there; and there is no ground nor colour for you to ſuſpect otherwiſe than that they were there, and he found them there. For the ſurmiſe of the priſoner at the bar, that they might be laid there, it is ſo foreign and without ground, that by and by you will think there is nothing at all in it. In the next place, we prove Colonel *Sidney*'s hand, and that by as much proof as the thing is capable of; ſuch a proof as in all caſes hath been allowed; and that is, for men to come that know and are acquainted with the hand-writing, and ſwear they know his hand-writing and they believe this to be his hand. You have heard from Mr. *Shepherd*, a man that uſed to tranſact buſineſs for him, pay money for him; and Mr. *Cook* and Mr. *Cary*, men of known credit in the city of *London*, that have had the like dealings with Colonel *Sidney*, and they ſwear this is his hand-writing, as they verily believe. So that, gentlemen, this proof to you of Colonel *Sidney*'s hand-writing does verify Sir *Philip Lloyd*, that theſe papers muſt be found there, if Colonel *Sidney* writ them; and then this being found that they were writ by him, the next thing will be, how far this will be an evidence to prove his compaſſing and imagining the death of the king. Compaſſing and imagining the death of the king is the act of the mind, and is treaſon whilſt it remains ſecret in the heart, though no ſuch treaſon can be puniſhed, becauſe there is no way to prove it; but when once there is an overt-act, that is, any thing that does manifeſt and declare ſuch intention, then the law takes hold of it, and it puniſhes it as high-treaſon.

Now after this evidence, I think no man will doubt whether it was in the heart of the priſoner at the bar to deſtroy the king. But firſt he objects, that this is a part of a book, and unleſs you take the whole, nothing can be made of it: as it is in wreſting of texts of ſcripture, ſays he, you may as well ſay, that *David* ſays, there is no God, becauſe *David* hath ſaid, "The fool hath ſaid in his heart, there is no God." But, gentlemen, the application will not hold; for you ſee a long diſcourſe hath been read to you, a

continued

continued thread of argument; it is not one propoſition, but a whole ſeries of argument: theſe are the poſitions, "That the king derives all his power from the people; that it is originally in the people, and the meaſure of ſubjection muſt be judged by the parliament; and if the king does fall from doing his duty, he muſt expect the people will exact it." And this he has laid down as no way prejudicial to him: for, ſays he, the king may refuſe the crown, if he does not like it upon theſe terms. But, ſays he, if he does accept it, he muſt expect the performance will be exacted, or revenge taken by thoſe he hath betrayed. Then next, he ſets up an objection, and then argues againſt it: ay, but ſhall the people be judge in their own cauſe? and thus he anſwers it, It muſt be ſo; for is not the king a judge in his own cauſe? how can any man elſe be tried, or convicted of any offence, if the king may not be judge in his own cauſe? for to adjudge by a man's ſelf, or by his deputy, is the ſame thing; and ſo a crime againſt the king cannot be puniſhed. And then he takes notice of it as a very abſurd poſition, "That the king ſhall judge in his own cauſe, and not the people." That would be to ſay, the ſervant entertained by the maſter ſhall judge the maſter, but the maſter ſhall not judge the ſervant. Gentlemen, after this ſort of argument he comes to this ſettled poſition, "We may therefore, ſays he, change or take away kings, (without breaking any yoke, or that is made a yoke;) the injury is therefore in impoſing the yoke, and there can be none at all in breaking of it." But he goes on in his book, and that is by way of anſwer to an objection, that if there be no injury, yet there may be inconvenience, if the headleſs multitude ſhould ſhake off the yoke. But, ſays he, I would fain know how the multitude comes to be headleſs; and there he gives you many inſtances in ſtory, and from foreign nations he comes home to the *Engliſh*, and tells you how all rebellions in later ages have been headed; and tells you the parliament is the head, or the nobility and gentry that compoſe it; and when the king fails in his duty, the people may call it. The multitude therefore is never headleſs, but they either find or create an head, ſo that there is a plain and avowed principle of rebellion eſtabliſhed upon the ſtrongeſt reaſon he has to back it. Gentlemen, this with the other evidence that has been given, will be ſufficient to prove his compaſſing the death of the king. You ſee the affirmations he makes; when kings do break their truſt they may be called to account by the people. This is the doctrine he broaches and argues for; he ſays in his book in another

another part, that the calling and diſſolving of parliaments is not in the king's power. Gentlemen, you all know how many parliaments the king hath called and diſſolved; if it be not in his power, he hath done that that was not in his power, and ſo contrary to his truſt. Gentlemen, at the entrance into this conſpiracy, they were under an apprehenſion that their liberties were invaded, as you heard in the evidence from my lord *Howard*, that they were juſt making the inſurrection upon that tumultuous oppoſition of electing of ſheriffs in *London*. They enter into a conſultation to raiſe arms againſt the king; and it is proved by my lord *Howard*, that the priſoner at the bar was one. Gentlemen, words ſpoken upon a ſuppoſition will be high-treaſon, as was held in king *James*'s time, in the caſe of *Collins* in *Roll*'s reports, "The king being excommunicate may be depoſed and murdered," without affirming he was excommunicated; and this was enough to convict him of high-treaſon. Now according to that caſe, to ſay the king having broken his truſt may be depoſed by his people, would be high-treaſon, but here he does as good as affirm the king had broke his truſt. When every one ſees the king hath diſſolved parliaments; this reduces it to an affirmation. And though this book be not brought to that council to be peruſed, and there debated, yet it will be another, and more than two witneſſes againſt the priſoner: for I would aſk any man, ſuppoſe a man was in a room, and there were two men, and he talks with both apart, and he comes to one and endeavours to perſuade him that it is lawful to riſe in arms againſt the king, if ſo be he break his truſt; and he ſhould go to another man, and tell him the king hath broke his truſt, and we muſt ſeek ſome way to redreſs ourſelves and perſuade the people to riſe: theſe two witneſſes do ſo tack this treaſon together, that they will be two witneſſes to prove him guilty of high-treaſon. And you have heard one witneſs prove it poſitively to you, that he conſulted to riſe in arms againſt the king, and here is his own book ſays, it is lawful for a man to riſe in arms againſt the king, if he breaks his truſt, and in effect he hath ſaid, the king hath broken his truſt: therefore this will be a ſufficient demonſtration what the imagination of the heart of this man was, that it was nothing but the deſtruction of the king and the government, and indeed of all governments. There can be no ſuch thing as government if the people ſhall be judge in the caſe: for what ſo uncertain as the heady and giddy multitude? Gentlemen, I think this will be a ſufficient evidence of his conſulting the death of the king. You have here the priſoner

ner at the bar that is very deep in it. Indeed ſome men may by paſſion be tranſported into ſuch an offence, and though the offence be never the leſs, whatever the motives are, yet in ſome it is leſs dangerous; for thoſe that venture upon paſſion to raiſe commotions and rebellion, are not always ſo much upon their guard, but that they make ſome falſe ſteps to entrap themſelves. But this gentleman proceeds upon a ſurer foundation, it is his reaſon, it is his principle, it is the guide of all his actions, it is that by which he leads and directs the ſteady courſe of his life. A man convinced of theſe principles, and that walks accordingly, what will not he do to accompliſh his deſign? how wary will he be in all his actions? ſtill reaſoning with himſelf, which way to bring it moſt ſecurely about. Gentlemen, this is the more dangerous conſpiracy in this man, by how much the more it is rooted in him; and how deep it is, you hear, when a man ſhall write as his principle, that it is lawful for to depoſe kings, they breaking their truſt, and that the revolt of the whole nation cannot be called rebellion. It will be a very ſad caſe when people act this according to their conſciences, and do all this for the good of the people, as they would have it thought; but this is the principle of this man. Gentlemen, we think we have plainly made it out to you, and proved it ſufficiently, that it was the imagination of his heart to deſtroy the king, and made ſufficient proof of high-treaſon.

Col. Sidney. Give me leave, my lord, to ſay a very few words. I deſire Mr. *Solicitor* would not think it his duty to take away men's lives any how: firſt, we have had a long ſtory——

L. C. J. Nay, Mr. *Sidney*, we muſt not have vying and revying, I aſked you before what you had to ſay; the courſe of evidence is, after the king's counſel have concluded, we never admit the priſoner to ſay any thing.

Col. Sidney. My lord, it was a wiſe man ſaid, there never could be too much delay in the life of a man: I know the king's counſel may conclude, if they pleaſe. Mr. *Solicitor*, I would not have him think that it is enough by one way or another to bring a man to death: my lord, this matter of Sir *Henry Vane* is utterly miſrepreſented——

L. C. J. I muſt tell you, gentlemen of the jury, that what the priſoner ſays, that is not proved, and what the king's counſel have ſaid, of which there is no proof to make it out, muſt not be taken into any conſideration.

Col. Sidney. Then, my lord, here is a place or two in old *Hale*'s [turning over my lord *Hale*'s book] for the overt-act of

of one treaſon, not being an overt-act of another, your lordſhip knows *Coke* and *Hales* were both againſt it. [He reads.] Compaſſing by bare words is not an overt-act, conſpiring to levy war is no overt-act.

Mr. Sol. Gen. I deſire but one word more for my own ſake as well as the priſoner's, and that is, that if I have ſaid any thing that is not law, or miſrepeated, or miſappli, ed the evidence which hath been given, I do make it my humble requeſt to your lordſhip to rectify thoſe miſtakes as well in point of fact as point of law; for God forbid the priſoner ſhould ſuffer by any miſtake.

L. C. J. Gentlemen, the evidence has been long, and it is a cauſe of great concernment, as it is far from the thoughts of the king, or from the thoughts, or deſire of any of his judges here to be inſtrumental to take away the life of any man, that by law his life ought not to be taken away. For I had rather many guilty men ſhould eſcape, than one innocent man ſuffer. The queſtion is, whether upon all the evidence you heard againſt the priſoner, and the evidence on his behalf, there is evidence ſufficient to convict the priſoner of the high-treaſon he ſtands charged with. And as you muſt not be moved by the denial of the priſoner further than as it is backed with proof; ſo you are not to be inveigled by any inſinuations made againſt the priſoner at the bar, further or otherwiſe than as the proof is made out to you. But it is uſual, and it is a duty incumbent on the king's counſel, to urge againſt all ſuch criminals, whatſoever they obſerve in the evidence againſt them, and likewiſe to endeavour to give anſwers to the objections that are made on their behalf. And, therefore, ſince we have been kept ſo long in this cauſe, it will not be amiſs for me (and my brothers, as they ſhall think fit,) to help your memory in the fact, and diſcharge that duty that is incumbent upon the court as to the points of law. This indictment is for high-treaſon, and is grounded upon the ſtatute of the 25th *Edw.* III. By which ſtatute, the compaſſing and imagining the death of the king, and declaring the ſame by an overt-act is made high-treaſon. The reaſon of that law was, becauſe at common-law there was great doubt what was treaſon: wherefore to reduce that high crime to a certainty was that law made, that thoſe that were guilty might know what to expect. And there are ſeveral acts of parliament made between the time of *Edw.* III. and that of 1 *M.* but by that ſtatute all treaſons that are not enumerated by after-acts of parliament remain as they were declared by that ſtatute of 25 *Edw.* III. And ſo are challenges and other matters, inſiſted upon by the

the priſoner, left as they were at the time of that act: I am alſo to tell you that in point of law, it is not only the opinion of us here, but the opinion of them that ſat before us, and the opinion of all the judges of *England*, and within the memory of many of you, that though there be two witneſſes required to prove a man guilty of high-treaſon, yet it is not neceſſary there ſhould be two witneſſes to the ſame thing at one time. But if two witneſſes prove to ſeveral facts, that have a tendency to the ſame treaſon, they are two witneſſes ſufficient to convict any man of high-treaſon. In the caſe of my lord *Stafford* in parliament, all the judges aſſiſting, it is notoriouſly known, that one witneſs to a conſpiracy in *England*, and another to a conſpiracy in *France*, were held two witneſſes ſufficient to convict him of high-treaſon. In the next place, I am to tell you, that though ſome judges have been of opinion that words of themſelves were not an overt-act; but my lord *Hales*, nor my lord *Coke*, nor any other of the ſages of the law, ever queſtioned but that a letter ſhould be an overt-act, ſufficient to prove a man guilty of high-treaſon; for *ſcribere eſt agere*. Mr. *Sidney* ſays, the king is a politick perſon; but you muſt deſtroy him in his natural capacity, or it is not treaſon; but I muſt tell you, if any man compaſs to impriſon the king, it is high-treaſon; ſo was the caſe of my lord *Cobham*. And my lord *Coke*, when he ſays, if a man do attempt to make the king do any thing by force and compulſion, otherwiſe than he ought to do, that it is high-treaſon within that act of 25 *Eliz.* III. But if it were an indictment only for levying of war, there muſt be an actual war levied; but this is an indictment for compaſſing the death of the king; and the other treaſon, mentioned in that act of parliament for the levying war, may be given in evidence to prove the conſpiracy of the king's death: For it is rightly told you by the king's counſel, that the imagination of a man's heart is not to be diſcerned; but if I declare ſuch my imagination by an overt-act, which overt-act does naturally evince, that the king muſt be depoſed, deſtroyed, impriſoned, or the like, it will be ſufficient evidence of treaſon within that act. In the next place, having told you what the law is, for, gentlemen, it is our duty upon our oaths, to declare the law to you, and you are bound to receive our declaration of the law, and upon this declaration, to inquire whether there be a fact, ſufficiently proved, to find the priſoner guilty of the high-treaſon of which he ſtands indicted: and for that I muſt tell you, whatever happens to be hear-ſay from others, it is not to be applied immediately to the priſoner; but however thoſe matters

that are remote at firſt may ſerve for his purpoſe, to prove there was generally a conſpiracy to deſtroy the king and government: and for that matter you all remember it was the conſtant rule and method to be obſerved about the popiſh plot, firſt to produce the evidence of the plot in general: this was done in that famous caſe of my lord *Stafford* in parliament. Gentlemen, I am alſo to tell you, this alone does not at all affect the priſoner at the bar, but is made uſe of as a circumſtance to ſupport the credibility of the witneſſes; and is thus far applicable to the buſineſs before you, that it is plain, by perſons that do not touch the priſoner at the bar, (and I am ſorry any man makes a doubt of it at this time of day) that there was a conſpiracy to kill the king; for after ſo full a proof in this place, and in others, and the execution and confeſſion of ſeveral of the offenders, I am ſurprized to obſerve that the priſoner at the bar, and ſome others preſent, ſeem not to believe it.

But, gentlemen, you hear the firſt witneſs; I ſpeak of *Weſt*: he tells you he had the honour to be acquainted with Mr. *Sidney*, and that he had diſcourſe with *Walcot*, a perſon convicted and executed for this horrid conſpiracy. Why, ſays he, he told me at my chamber, That they were not the only perſons concerned, but that there were other perſons of great quality that had their meetings for carrying on the buſineſs in other places. And *Ferguſon*, that was the ringleader in this conſpiracy, told him there was a deſign of a general inſurrection; it was once laid down, but it is now taken up again. There are other counſellors of great importance; and he names among the reſt, the priſoner at the bar. Mr. *Weſt* goes a little further, and he tells you this: ſays he, He did not only tell me ſo, but that there was a deſign to conciliate a correſpondence with ſome perſons in *Scotland*, and they were to do it under the cant of having buſineſs in *Carolina*. There is Mr. *Keeling*, he tells you too, There was a deſign for a general and publick inſurrection; that he was preſent with the *Goodenoughs*, one and the other, and that they had taken upon them to divide, and did divide the city into ſuch and ſuch diſtricts: and what was the buſineſs? It was, that there might be a general inſurrection; might be an inſurrection, not only to deſtroy the king and the duke, but to deſtroy all the king's loyal ſubjects; and in taking away their lives, to take away the life of monarchy itſelf, and to ſubvert the religion eſtabliſhed by law. Then comes in Col. *Rumſey*, and he gives you an account that he had heard of ſuch things in Mr. *Weſt*'s chamber; and tells you he had received ſuch intelligence. And all theſe give you an account, that there was ſuch a

deſign

deſign to kill the king: and this is the ſubſtance of the general evidence produced to prove the conſpiracy. Then to make this matter come home to the priſoner at the bar, firſt my lord *Howard* gives you an account, and does directly ſwear, That about the middle or latter end of *January* laſt, he happened to meet with Col. *Sidney*, the priſoner at the bar, and the duke of *Monmouth* (they were the perſons firſt began to have diſcourſe about this matter) and how they met with a diſappointment; the thing had ſlept a great while, and that it was fit it ſhould be revived again: and that perſons of quality were mentioned, who were to have an immediate care in the carrying on of the buſineſs, and that it ſhould not be divulged to too many; accordingly there was my lord *Ruſſel*, my lord of *Eſſex*, my lord of *Saliſbury*, and Mr. *Hampden* named. He tells you, the priſoner at the bar undertook for my lord of *Eſſex* and Mr. *Hampden*, and he tells you, the duke of *Monmouth* undertook for my lord *Ruſſel*, and the reſt; and that this was the reſult of one meeting: he goes yet further, That purſuant to this it was communicated to thoſe perſons ſo to be engaged, and the place and time was appointed: the place, Mr. *Hampden*'s houſe; but is not ſo poſitive to the time, but only to the place and perſons. He ſays, All theſe perſons met, and he gives you an account, That Mr. *Hampden* (becauſe it was neceſſary for ſome perſon to break ſilence) gave ſome ſhort account of the deſign of their meeting, and made ſome reflexions upon the miſchiefs that attended the government, and what apprehenſions many people had upon the late choice of ſheriffs, and that there had been a male-adminiſtration of publick juſtice; that it was fit ſome means ſhould be uſed to redreſs theſe grievances. He cannot tell you poſitively, what this man, or that man ſaid there; but ſays, that all did unanimouſly conſent to what was then debated about an inſurrection: and in order to it, they diſcourſed about the time, when it ſhould be, and that they thought fit it ſhould be done ſuddenly, while men's minds were wound up to that height, as they then were; and as the firſt witneſs tells you, There was a conſideration, whether it ſhould be at one place, or at ſeveral places together: he ſays, then it was taken into conſideration, that this could not be carried on, but there muſt be arms and ammunition provided. The next ſtep is, about a neceſſary concern, the concern of money, and therefore our law calls money, "The ſinews of war." My lord *Howard* tells you, That the duke of *Monmouth* propoſed 25 or 30,000l. That my lord *Grey* was to advance 10,000l. out

of

of his own eſtate; but then they thought to make their party more ſtrong by the aſſiſtance of a diſcontented people in *Scotland*, my lord of *Argyle*, and Sir *John Cockram*, and ſeveral other people there to join with them. That purſuant to this, they all after met at my lord *Ruſſel*'s, and the ſame debate is re-aſſumed, and among the reſt, this particular thing of conciliating a friendſhip with the *Scotch*; the *Campbels*, my lord of *Argyle*, and my lord *Melvin* were particularly mentioned. That Colonel *Sidney* took upon himſelf to find out a meſſenger, but it was my lord *Ruſſel*'s part to write the letter; one of the meſſengers named to convey the ſame, was *Aaron Smith*, he was known, ſays my lord *Howard*, to ſome of us; and then we all agreed, that *Aaron Smith* was the moſt proper man: upon this they brake up that very time. Afterwards comes my lord *Howard* to Colonel *Sidney* at ſome diſtance of time, and he comes to him, and ſhews him threeſcore guineas, and told him he was going into the city, and that they were to be given to *Aaron Smith*. He tells you after this, That he had ſome other diſcourſe about a fortnight or three weeks after, with Colonel *Sidney*; and that Colonel *Sidney* did take notice, that he had ſent him, and that he had an account of him, as far as *Newcaſtle*. So that it is very plain, that it was not ſudden and raſh thoughts, it is a little more than, according to the language we meet with in ſome pamphlets of late, more than heats and ſtirs. Gentlemen, Then I muſt tell you here are circumſtances proved in purſuance of this deſign, for Sir *Andrew Forſter* informs you, how that Sir *John Cockram* and the *Campbels*, and one *Monro*, as I take it, came to town, and that he had diſcourſe with ſome of them about their buſineſs of coming out of *Scotland*; and he ſays, they pretended it was about ſome buſineſs of ſome trade to *Carolina*, which does ſtill corroborate the evidence. He tells you likewiſe, that there being a noiſe of diſcovering the plot, they began to hide; Sir *John Cockram* began to hide, and ſculk from place to place; they come firſt with their cant in their mouths, about *Carolina*; the meſſenger *Atterbury* tells you, When they came to take theſe men, how they ſhuffled from place to place. So, gentlemen, I muſt tell you, That if in this caſe there be but one witneſs to prove a direct treaſon, and another witneſs to a circumſtance that contributes to that treaſon, that will make two witneſſes to prove the treaſon: becauſe I would explain my mind, Not long ago all the judges of *England* were commanded to meet together, and one that is the *ſenior* of the king's counſel was pleaſed to put this caſe. If

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I buy a knife of *J. S.* to kill the king, and it be proved by one witneſs I bought a knife for this purpoſe, and another comes and proves, I bought ſuch a knife of *J. S.* they are two witneſſes ſufficient to prove a man guilty of high-treaſon; and ſo it was held by all the judges of *England* then preſent, in the preſence of all the king's counſel. And therefore Mr. *Sidney* is mightily miſtaken in the law: for in caſe of any treaſon (except the treaſon at the bar) or in treaſon for clipping and coining, one witneſs is ſufficient at this day. Now, gentlemen, ſuppoſing all this ſhould not be ſufficient, here is a libel, and it is a moſt traitorous and ſeditious libel. If you believe, that that was Colonel *Sidney*'s book, writ by him, no man can doubt but it is a ſufficient evidence, that he is guilty of compaſſing and imagining the death of the king; and let us conſider, what proof can be greater, that what has been given of it. Mr. *Sheppard*, an intimate acquaintance of his, that has ſeen him write, he looks upon the hand, and ſays, He is extremely acquainted with the hand, and ſays he, I believe in my conſcience, this book is Colonel *Sidney*'s hand. Gentlemen, Do you expect Mr. *Sidney* would call a witneſs to be by to ſee him write that book?

In the next place, you have two tradeſmen, *Coke* and *Cary*, and they tell you, one had ſeen him write once, the other had ſeen his hand-writing, and they both believe it his hand-writing; and they have good reaſon, for they have paid ſeveral ſums of money, upon notes which they took, as well as this, to be his hand-writing. Gentlemen, Beſides that, give me leave to tell you, here is another thing, that makes it more plain. This very book is found in Colonel *Sidney*'s houſe, on the table in his ſtudy, where he uſed to write, by a gentleman, againſt whom Colonel *Sidney* cannot make the leaſt objection; and that there was that fairneſs offered by the gentleman, "Pray, Colonel, put your ſeal upon it, that you may ſee, that no injury be done you;" but Mr. *Sidney* would not do it. Therefore he ſeals them with his own ſeal, and carries them to *Whitehall*, where they were broken open, and ſwears that thoſe papers were found in his cloſet, whereof this was one. Another thing which I muſt take notice of to you in this caſe, is, to mind you, how this book contains all the malice, and revenge, and treaſon, that mankind can be guilty of: it fixes the ſole power in the parliament and the people; ſo that he carries on the deſign ſtill, for their debates at their meetings were to that purpoſe. And ſuch doctrines as theſe ſuit with their debates; for there, a general inſurrec-

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tion was deſigned, and that was diſcourſed of in this book, and encouraged: they muſt not give it an ill name; it muſt not be called a rebellion, it being the general act of the people. The king, he ſays, is reſponſible to them, the king is but their truſtee; that he had betrayed his truſt, he had miſgoverned, and now he is to give it up, that they may be all kings themſelves. Gentlemen, I muſt tell you, I think I ought more than ordinarily to preſs this upon you, becauſe I know the misfortune of the late unhappy rebellion, and the bringing the late bleſſed king to the ſcaffold was firſt begun by ſuch kind of principles: they cried, he had betrayed the truſt that was delegated to him from the people. Gentlemen, in the next place, becauſe he is afraid their power alone will not do it, he endeavours to poiſon men's judgments; and the way he makes uſe of, he colours it with religion, and quotes ſcripture for it too: and you know how far that went in the late times; how we were for binding our king in chains, and our nobles in fetters of iron. Gentlemen, this is likewiſe made uſe of by him to ſtir up the people to rebellion. Gentlemen, if in caſe the priſoner did deſign the depoſing the king, the removing the king, and if in order thereunto he be guilty of conſpiring to levy war; or as to the letter writ by my lord *Ruſſel*, if he was privy to it, theſe will be evidences againſt him. So that it is not upon two, but it is upon greater evidence than 22, if you believe this book was writ by him. Next I muſt tell you, gentlemen, upon, I think, a leſs teſtimony an indictment was preferred againſt the late lord *Ruſſel*, and he was thereupon convicted and executed; of which they have brought the record. Theſe are the evidences for the king.

For the priſoner, he hath made ſeveral objections; as that there was no war levied: for that, Gentlemen, at the beginning of the cauſe I told you what I took the law to be, and I take it to be ſo very plainly. But, gentlemen, as to the credibility of my lord *Howard*, he offers you ſeveral circumſtances. Firſt, he offers you a noble lord, my lord *Angleſey*, who ſays, that he attended my lord of *Bedford*, upon the misfortune of the impriſonment of his ſon; after he had done, my lord *Howard* came to ſecond that part of a chriſtian's office, which he had performed, and told him, he had a very good ſon, and he knew no harm of him; and as to the plot, he knew nothing of it. Another noble lord, my lord *Clare*, tells you, that he had ſome diſcourſe with my lord *Howard*, and he ſaid, if he were accuſed, he thought they would but tell noſes, and his buſineſs was done. Then Mr.

Philip Howard, he tells you, how he was not ſo intimate with him as others but he often came to his brother's; and that he ſhould ſay, he knew nothing of a plot, nor did he believe any; but at the ſame time, he ſaid he believed there was a ſham plot; and then he preſſed him about the buſineſs of the addreſs; but that now my lord of *Eſſex* was out of town, and ſo it went off. Another thing Mr. *Sidney* took notice of, ſays he, it is an act of revenge in my lord *Howard*, for he owes him a debt, that he does (beſides by his allegation) does not appear.

Col. Sidney. My lord, he hath confeſſed it.

L. C. J. Admit it; yet in caſe Colonel *Sidney* ſhould be convicted of this treaſon, the debt accrues to the king and he cannot be a farthing the better for it. But how does it look like revenge? I find my lord *Howard*, when he ſpeaks of Colonel *Sidney*, ſays he was more beholden to him than any body, and was more ſorry for him; ſo ſays my lord *Clare*. Gentlemen, you have it likewiſe offered, that he came to Colonel *Sidney*'s houſe, and there he was deſirous to have the plate and goods removed to his houſe, and that he would aſſiſt them with his coach and coachman to carry them thither; and did affirm, that he knew nothing of the plot; and did not believe Colonel *Sidney* knew any thing: and this is likewiſe proved by a couple of maid-ſervants, as well as the *Frenchman*. You have likewiſe ſomething to the ſame purpoſe ſaid by my lord *Paget*, and this is offered to take off the credibility of my lord *Howard*. Do you believe, becauſe my lord *Howard* did not tell them, I am in a conſpiracy to kill the king, therefore he knew nothing of it? He knew theſe perſons were men of honour and would not be concerned in any ſuch thing. But do you think becauſe a man goes about and denies his being in a plot, therefore he was not in it? Nay, it ſeems ſo far from being an evidence of his innocence, that it is an evidence of his guilt. What ſhall provoke a man to diſcourſe after this manner, if he had not apprehenſion of guilt within himſelf? This is the teſtimony offered againſt my lord *Howard* in diſparagement of his evidence. Ay, but farther it is objected, he is in expectation of a pardon: and he did ſay, he thought he ſhould not have the king's pardon till ſuch time as the drudgery of ſwearing was over. Why, gentlemen, I take notice, before the diſcourſe happened, he ſwore the ſame thing at my lord *Ruſſel*'s trial. And I muſt tell you, though it is the duty of every man to diſcover all treaſons; yet I tell you for a man to come and ſwear himſelf over and

over

over guilty, in the face of the Court of juſtice, may ſeem irkſome and provoke a man to give it ſuch an epithet. It is therefore for his credit, that he is an unwilling witneſs: but, gentlemen, conſider, if theſe things ſhould have been allowed to take away the credibility of a witneſs what would have become of the teſtimonies that have been given of late days? What would become of the evidence of all thoſe that have been ſo profligate in their lives? Would you have the king's counſel to call none but men that were not concerned in this plot, to prove that they were plotting? Ay, but gentlemen, it is further objected, this hand looks like an old hand, and it may not be the priſoner's hand, but be counterfeited; and for that, there is a gentleman, who tells you what a dextrous man he is. He ſays, he believes he could counterfeit any hand in half an hour; it is an ugly temptation, but I hope he hath more honour than to make uſe of that art, he ſo much glories in. But what time could there be for the counterfeiting of this book? can you imagine that Sir *Philip Lloyd* through the bag ſealed up did it? Or who elſe, can you imagine, ſhould, or, does the priſoner pretend, did write this book? So that as on one ſide, God forbid, but we ſhould be careful of mens lives, ſo on the other ſide, God forbid, that flouriſhes and varniſh ſhould come to endanger the life of the king, and the deſtruction of the government. But, gentlemen, we are not to anticipate you in point of fact, I have according to my memory, recapitulated the matters given in evidence. It remains purely in you now, whether you do believe upon the whole matter, that the priſoner is guilty of the high-treaſon whereof he is indicted.

Mr. Juſt. Withins. Gentlemen, it is fit you ſhould have our opinions; in all the points of law we concur with my Lord Chief Juſtice: ſays Colonel *Sidney*, here is a mighty conſpiracy, but nothing comes of it; who muſt we thank for that? None but the almighty providence: One of themſelves was troubled in conſcience, and comes and diſcovers it; had not *Keeling* diſcovered it, God knows whether we might have been alive at this day.

Then the jury withdrew, and in about half an hour's time returned, and brought the priſoned in, guilty.

Then the Lieutenant of the tower took away his priſoner.

ON the 26th of *November*, *Algernon Sindey*, Eſq; was brought to the bar of the Court of *King's-Bench*, to receive his ſentence, which being pronounced:

Col. Sidney. Then, O God! O God! I beſeech thee to ſanctify theſe ſufferings unto me, and impute not my blood to the country, nor the city, through which I am to be drawn; let no inquiſition be made for it, but if any, and the ſhedding of blood that is innocent, muſt be revenged, let the weight of it fall only upon thoſe, that maliciouſly perſecuted me for righteouſneſs ſake.

L. C. J. I pray God work in you a temper fit to go into the other world, for I ſee you are not fit for this.

Col. Sidney. My lord, feel my pulſe, [holding out his hand] and ſee if I am diſordered; I bleſs God, I never was in better temper than I am now.

Then the lieutenant of the Tower carried back his priſoner.

The priſoner afterwards preſented a petition to the king, which ſee in *State-trials*, Vol. VIII. p. 453.

ON the 7th of *December* (his majeſty having been pleaſed to remit[a] all the ſentence but beheading) he was brought to a ſcaffold erected for that purpoſe on *Tower-hill*, where, having delivered the following paper to the ſheriff, his head was ſevered from his body.

Men, brethren, and fathers; friends, countrymen, and ſtrangers,

It may be expected that I ſhould now ſay ſome great matters unto you; but the rigour of the ſeaſon, and the infirmities of my age, increaſed by a cloſe impriſonment of above five months, do not permit me.

Moreover we live in an age that maketh truth paſs for treaſon: I dare not ſay any thing contrary unto it, and the ears of thoſe that are about me will probably be found too tender to hear it. My trial and condemnation do ſufficiently evidence this.

Weſt, *Rumſey* and *Keeling*, who were brought to prove the plot, ſaid no more of me, than that they knew me not; and

[a] This was becauſe of his family, he being brother to the earl of *Leiceſter*.

and ſome others equally unknown unto me, had uſed my name, and that of ſome others, to give a little reputation unto their deſigns. The lord *Howard* is too infamous by his life, and the many perjuries not to be denied, or rather ſworn by himſelf, to deſerve mention; and being a ſingle witneſs would be of no value, though he had been of unblemiſhed credit, or had not ſeen and confeſſed that the crime committed by him would be pardoned only for committing more; and even the pardon promiſed could not be obtained till the drudgery of ſwearing was over.

This being laid aſide, the whole matter is reduced to the papers ſaid to be found in my cloſet by the king's officers, without any other proof of their being written by me, than what is taken from ſuppoſitions upon the ſimilitude of an hand that is eaſily counterfeited, and which hath been lately declared in the lady *Carr*'s caſe to be no lawful evidence in criminal cauſes.

But if I had been ſeen to write them, the matter would not be much altered. They plainly appear to relate unto a large treatiſe written long ſince, in anſwer to *Filmer*'s book, which, by all intelligent men, is thought to be grounded upon wicked principles, equally pernicious unto magiſtrates and people.

If he might publiſh unto the world his opinion, that all men are born under a neceſſity derived from the laws of God and nature, to ſubmit unto an abſolute kingly government, which could be reſtrained by no law or oath; and that he that hath the power, whether he came unto it by creation, election, inheritance, uſurpation, or any other way, had the right; and none muſt oppoſe his will, but the perſons and eſtates of his ſubjects muſt be indiſpenſibly ſubject unto it; I know not why I might not have publiſhed my opinion to the contrary, without the breach of any law I have yet known.

I might as freely as he publickly have declared my thoughts, and the reaſons upon which they were grounded; and I am perſuaded to believe, that God had left nations under the liberty of ſetting up ſuch governments as beſt pleaſed themſelves.

That magiſtrates were ſet up for the good of nations, not nations for the honour or glory of magiſtrates.

That the right and power of magiſtrates in every country, was that which the laws of that country made it to be.

That thoſe laws were to be obſerved, and the oaths taken by them, having the force of a contract between magiſtrates

and people, could not be violated without danger of diſſolving the whole fabrick.

That uſurption could give no right, and the moſt dangerous of all enemies unto kings were they, who, raiſing their power to an exorbitant height, allowed unto uſurpers all the rights belonging unto it.

That ſuch uſurpations being ſeldom compaſſed without the ſlaughter of the reigning perſon, or family, the worſt of all villains was thereby rewarded with the moſt glorious privileges.

That if ſuch doctrines were received, they would ſtir up men to the deſtruction of princes with more violence, than all the paſſions that have hitherto raged in the hearts of the moſt unruly.

That none could be ſafe, if ſuch a reward were propoſed unto any that could deſtroy them.

That few would be ſo gentle as to ſpare even the beſt, if by their deſtruction a wild uſurper could become God's anointed; and by the moſt execrable wickedneſs inveſt himſelf with that divine character.

This is the ſcope of the whole treatiſe; the writer gives ſuch reaſons as at preſent did occur unto him, to prove it. This ſeems to agree with the doctrines of the moſt reverenced authors of all times, nations and religions. The beſt and wiſeſt of kings have ever acknowledged it. The preſent king of *France* hath declared that kings have that happy want of power, that they can do nothing contrary to the laws of their country, and grounds his quarrel with the king of *Spain*, *anno* 1667, upon that principle. King *James*, in his ſpeech to the parliament, *anno* 1603, doth in the higheſt degree aſſert it: the ſcripture ſeems to declare it. If nevertheleſs the writer was miſtaken, he might have been refuted by law, reaſon and ſcripture; and no man, for ſuch a matter, was ever otherwiſe puniſhed, than by being made to ſee his error; and it hath not (as I think) been ever known that they had been referred to the judgment of a jury, compoſed of men utterly unable to comprehend them.

But there was little of this in my caſe; the extravagance of my proſecutors goes higher: the above-mentioned treatiſe was never finiſhed, nor could be in many years, and moſt probably would never have been. So much as is of it was written long ſince, never reviewed nor ſhewn unto any man; and the fiftieth part of it was produced, and not the tenth of that offered to be read. That which was never known unto thoſe who are ſaid to have conſpired with me,

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was ſaid to be intended to ſtir up the minds of the people in proſecution of the deſigns of thoſe conſpirators.

When nothing of particular application unto time, place, or perſon, could be found in it (as hath ever been done by thoſe who endeavoured to raiſe inſurrections) all was ſupplied by *Innuendo's*.

Whatſoever is ſaid of the expulſion of *Tarquin;* the inſurrection againſt *Nero;* the ſlaughter of *Caligula*, or *Domitian;* the tranſlation of the crown of *France* from *Merovens*'s race unto *Pepin*; and from his deſcendants unto *Hugh Capet*, and the like, applied by *Innuendo* unto the king.

They have not conſidered, that if ſuch acts of ſtate be not good, there is not a king in the world that has any title to the crown he bears; nor can have any, unleſs he could deduce his pedigree from the eldeſt ſon of *Noah*, and ſhew that the ſucceſſion had ſtill continued in the eldeſt lines, and been ſo deduced to him.

Every one may ſee what advantage this would be to all the kings of the world, and whether, that failing, it were not better for them to acknowledge they had received their crowns by the conſent of willing nations; or to have no better title unto them than uſurpation and violence, which, by the ſame ways, may be taken from them.

But I was not long ſince told that I muſt die, or the plot muſt die.

Leſt the means of deſtroying the beſt proteſtants in *England* ſhould fail, the bench muſt be filled with ſuch as had been blemiſhes to the bar.

None but ſuch as theſe would have adviſed with the king's counſel of the means of bringing a man to death, ſuffered a jury to be packed by the kings ſolicitors and the under ſheriff, admit of jurymen who were not freeholders, receive ſuch evidence as is above-mentioned, refuſe a copy of an indictment, or to ſuffer the ſtatute of 46 *Edw.* III. to be read, that doth expreſly enact, it ſhould in no caſe be denied unto any man, upon any occaſion whatſoever, overrule the moſt important points of law without hearing. And whereas the ſtatute 25 *Edw.* III. upon which they ſaid I ſhould be tried, doth reſerve unto the parliament all conſtructions to be made in points of treaſon, they could aſſume unto themſelves not only a power to make conſtructions, but ſuch conſtructions, as neither agreed with law, reaſon, or common ſenſe.

By theſe means I am brought to this place. The Lord forgive theſe practices, and avert the evils that threaten the nation from them. The Lord ſanctify theſe my ſufferings unto

unto me; and though I fall as a ſacrifice unto idols, ſuffer not idolatry to be eſtabliſhed in this land. Bleſs thy people and ſave them. Defend thy own cauſe and defend thoſe that defend it. Stir up ſuch as are faint, direct thoſe that are willing, confirm thoſe that waver, give wiſdom and integrity unto all. Order all things ſo as may moſt redound unto thine own glory. Grant that I may die glorifying thee for all thy mercies, and that at the laſt thou haſt permitted me to be ſingled out as a witneſs of thy truth; and even by the confeſſion of my oppoſers, for that old cauſe in which I was from my youth engaged, and for which thou haſt often and wonderfully declared thyſelf. *State Trials*, Vol. III. p. 794.

His attainder was reverſed in parliament, the firſt of *Will.* and *Mary*. See *State Trials*, Vol. VIII. p. 517.

The compiler of this work perceiving that ſhould he go regularly through the various trials for theſe offences, they would engroſs a portion of room inconſiſtent with the original deſign of this publication, which was to unite variety with entertainment and inſtruction: he will therefore reduce the ſubſequent proſecutions for theſe offences, to a ſtatement ſimply of the libel, and the puniſhment inflicted on the offender.

The CASE of THOMAS ROSEWELL, a Diſſenting Preacher, for *High-Treaſon*, at the *King's-Bench-Bar*, on the 18th of *November*, 1684. *Mich.* 36 *Car.* II.

THE indictment charged, that the priſoner, *Thomas Roſewell*, on the 14th of *September*, in the 36th year of the king, at the pariſh of *Rotherhith*, in the county of *Surry*, did compaſs and imagine the death of his majeſty, and to raiſe a rebellion; and that, to accompliſh his ſaid traitorous purpoſes, he did, at the time and place aforeſaid, in a certain unlawful aſſembly, preach, ſpeak, aſſert and declare the following words, (viz.) That the people made a flocking to the king, upon pretence of healing the king's evil, which he could not do; but that they, meaning himſelf, and other traitorous perſons, the king's ſubjects, were the perſons they ought to flock to, becauſe they were prieſts and

and prophets, who by their prayers could heal the dolours and griefs of the people: that they had had two wicked kings together, meaning king *Charles* I. and king *Charles* II. who had permitted popery to enter in under their noſes; whom they could reſemble to no other perſon but the moſt wicked *Jeroboam*: and that if they, meaning the ſaid evil-diſpoſed perſons, unlawfully aſſembled, would ſtand to their principles, he did not fear but they would overcome their enemies, meaning the king and his ſubjects, as in former times, with rams-horns, broken platters, and a ſtone in a ſling: all which was laid to be againſt the duty of his allegiance, the kings peace, &c.

The jury found him guilty.[a] He received a pardon from the king.

The CASE of RICHARD BAXTER, Clerk, for a Seditious Libel, at *Guildhall*, 30th *May*, 1685. 1 *James* II.

THE charge againſt *Richard Baxter*, was for publiſhing a ſeditious libel, entitled "A Paraphraſe on the Teſtament, with notes doctrinal and practical." In which he ſays of the clergy of the church of *England*, that "theſe preachers and prelates are the leaſt and baſeſt that preach and tread down chriſtian love, of all that diſſent from any of their preſumptions, and ſo preach down not the leaſt, but the great command"——that "It is folly to doubt whether there be devils, while devils incarnate

[a] The only caſes for treaſonable ſpeeches contained in this compilation, is that of *John James*, p. 245. who was executed, and this of *Thomas Roſewell*. It was obſerved in page 198 that *words ſpoken*, amount only to a high miſdemeanor, and no treaſon. This may require explanation; theſe two trials happened in the time of *Charles* II. in the 13th year of whoſe reign, an act was paſſed, entitled, *An act for the ſafety and preſervation of his majeſty's perſon and government, againſt treaſonable and ſeditious practices and attempts*, which after reciting that the troubles and diſorders of the preceding reign proceeded chiefly from a multitude of ſeditious ſermons, pamphlets and ſpeeches, it was enacted that whoſoever ſhall compaſs, deviſe, or imagine the death, maim, wounding, impriſonment or reſtraint of the king, during his natural life, and expreſs it by either printing, writing, *preaching* or *malicious and adviſed ſpeaking*, ſhall ſuffer as in caſes of *high-treaſon*: with the death of *Charles* II. this act expired, therefore *words alone* unaccompanied by any other treaſonable acts cannot now be more than a high miſdemeanor.

carnate live here among us, what elſe but devils ſure could make ceremonious hypocrites conſult with politick royaliſts to deſtroy the Son of God, for ſaving mens health and lives by miracle? Query, whether if this whithered hand had been their own, they would have plotted to kill him, that would have cured them by a miracle, as a ſabbath-breaker? And whether their ſucceſſors would ſilence and impriſon godly miniſters if they could cure them of all their ſickneſſes, and help them to preferment, and give them money to feed their luſts. Men that preach in Chriſt's name therefore are not to be ſilenced though faulty, if they do more good than harm; dreadful then is the caſe of them that ſilence Chriſt's faithful miniſters. Let not theſe proud hypocrites deceive you, who by their long liturgies and ceremonies, and claim of ſuperiority, do but cloak their worldlineſs, pride and oppreſſion, and are religious to their greater damnation. Prieſts are many but labourers few; what men are they that have and do ſilence the faithfulleſt labourers, ſuſpecting that they are not for their intereſts. Chriſt's miniſters uſe God's ordinances to ſave men, and the Devils clergy uſe them for ſnares, miſchief and murder." &c.

The ſentence againſt him for the above libel was that he ſhould be fined 500l. and give ſecurity for his good behaviour for ſeven years. *State Trials*, Vol. X. Appendix. p. 37.

The CASE of Mr. SAMUEL JOHNSON, for Seditious Libels, at the *King's-Bench-Bar*, on *Monday* the 21ſt of *June*, 1686. 2 *Jac.* II.

SAMUEL JOHNSON was charged with having publiſhed two pernicious, ſcandalous and ſeditious libels, to raiſe and ſtir up ſedition and rebellion in his majeſty's liege-ſubjects, &c. The title of one being, An humble and hearty addreſs to all the *Engliſh* proteſtants in this preſent army. Which is as follows:

An humble and hearty addreſs to all the *Engliſh* proteſtants in this preſent army.

Gentlemen,

NEXT to the duty which we owe to God, which ought to be the principal care of men of your profeſſion eſpecially, becauſe you carry your lives in your hands, and often look death

death in the face; the ſecond thing that deſerves your conſideration, is the ſervice of your native country, wherein you drew your firſt breath, and breathed a free *Engliſh* air. Now I would deſire you to conſider, how well you comply with theſe two main points, by engaging in this preſent ſervice.

Is it in the name of God, and for his ſervice, that you have joined yourſelves with papiſts; who will indeed fight for the maſs-book, but burn the bible: and who ſeek to extirpate the proteſtant religion with your ſwords, becauſe they cannot do it with their own? And will you be aiding and aſſiſting to ſet up maſs-houſes, to erect that popiſh kingdom of darkneſs and deſolation amongſt us, and to train up all our children in popery? How can you do theſe things, and yet call yourſelves proteſtants.

And then what ſervice can be done to your country by being under the command of *French* and *Iriſh* papiſts, and by bringing the nation under a foreign yoke? Will you help them to make forcible entry into the houſes of your countrymen, under the name of *Quartering*, directly contrary to *Magna Charta*, and the *Petition of Right?* Will you be aiding and aſſiſting to all the murders and outrages which they ſhall commit by their void commiſſions? which were declared illegal, and ſufficiently blaſted by both houſes of parliament (if there had been any need of it) for it was very well known before, that a papiſt cannot have a commiſſion, but by the law is utterly diſabled and diſarmed. Will you exchange your birth-right of *Engliſh* laws and liberties for martial, or club-law; and help to deſtroy all others, only to be eaten laſt yourſelves; If I know you well, as you are *Engliſhmen*, you hate and ſcorn theſe things. And therefore be not unequally yoked with idolatrous and bloody papiſts: "Be valiant for the truth, and ſhew yourſelves men."

The ſame conſiderations are likewiſe humbly offered to all the *Engliſh* ſeamen, who have been the bulwark of this nation againſt popery and ſlavery ever ſince eighty-eight.

And the others, viz. "The opinion is this, that reſiſtance may be uſed, in caſe our religipn and rights ſhould be invaded:[a]"

For theſe libels Sir *Francis Withins* pronounced the following ſentence upon him: to pay five hundred marks to the king, and to lie in priſon till it was paid: to ſtand thrice in the pillory, in the *Palace-yard*, at *Charing-croſs*, and at the *Old-Exchange*: and to be whipt by the common hangman from

[a] This is printed in Mr. *Johnſon*'s works, *p* 159, to 166. which being too long to inſert here, the reader is referred to it.

from *Newgate* to *Tyburn*. The judges then in Court, were Lord Chief-Juſtice *Herbert*, Sir *Francis Withins*, Sir *Robert Wright*, and Sir *Richard Holloway*, who apprehending it would be a ſcandal to the clergy to have ſo infamous a puniſhment inflicted on a miniſter, deſired Mr. *Johnſon* might be firſt degraded: in order to which, being a priſoner in the *King's-Bench*, in the dioceſe of the biſhop of *Wincheſter*, he was ſummoned to appear the 20th of *November*, in the convocation-houſe of St. *Paul*'s in the dioceſe of *London*, his living being in that dioceſe, and brought thither by *Habeas Corpus*; where he found the biſhops of *Durham*, *Rocheſter*, and *Peterborough*, commiſſioners to exerciſe the juriſdiction of the biſhop of *London*, during his ſuſpenſion; with ſome clergymen, and many ſpectators. A libel was exhibited againſt him, charging him with great miſ-behaviours, though none were ſpecified or proved. Mr. *Johnſon* demanded a copy of the libel, and an advocate, both which the biſhops denied, and immediately proceeded to ſentence, that he ſhould be declared an infamous perſon, that he ſhould be deprived of his rectory, that he ſhould be a mere layman, and no clerk, and be deprived of all right and privilege of prieſthood; that he ſhould be degraded thereof, and of all veſtments and habits of prieſthood. Againſt which proceedings Mr. *Johnſon* proteſted, as being againſt law, and the 132d canon; not being done by his own dioceſan. But his proteſtation was refuſed, as was alſo his appeal to the king in *Chancery*.

After which, they proceeded to degrade him, by putting a ſquare cap on his head, and then taking it off: by pulling off his gown and girdle, which he demanded as his proper goods, bought with his money, which they promiſed to ſend him, but he could not get them till he paid twenty ſhillings. Then they put a bible into his hands, which he not parting with readily, they took it from him by force. On the 22d of *November*, the judgment in the *King's-Bench* began to be executed with great rigour and cruelty: Mr. *Rouſe*, the under-ſheriff, tore off his caſſock on the pillory, and put a frize coat upon him: he was whipped with a whip of nine cords, knotted. Mrs. *Johnſon* had alſo an information exhibited againſt her, for the like matter as that againſt her huſband.

June 11, 1689, the parliament took Mr. *Johnſon*'s caſe into conſideration, and reſolved that the judgment againſt him was illegal and cruel: that the eccleſiaſtical commiſſion was illegal, and conſequently the ſuſpenſion of the biſhop

of

of *London*, and the authority committed to the three biſhops, null and illegal. That Mr. *Johnſon* not being degraded by his own dioceſan, if he had deſerved it, was illegal: that a bill be brought in, to reverſe the judgment, and to declare all the proceedings before the three biſhops null and illegal. And that an addreſs be made to his majeſty, to recommend Mr. *Johnſon* to ſome eccleſiaſtical preferment, ſuitable to his ſervices and ſufferings.

The houſe likewiſe ordered, That in the ſaid bill the proceedings upon the eccleſiaſtical commiſſion ſhould be declared void.

The houſe preſented two addreſſes to the king in behalf of Mr. *Johnſon*: but though his majeſty was inclinable enough to have complied with their requeſt, Mr. *Johnſon* could never obtain any church-preferment. Mr. *Johnſon* however being a man of ſuch merit, did not paſs altogether without a reward; for the king gave him three hundred pounds a year out of the *Poſt-Office*, for his and his ſon's life; beſides a thouſand pounds in money, and likewiſe beſtowed a place of about a hundred pounds a year to his ſon. *State Trials*, Vol. VII. p. 645.

IN the interval between the laſt proſecution of *Samuel Johnſon* in 1686, and the ſucceeding proſecution of *John Tutchin*, a moſt important reformation in the adminiſtration of public juſtice took place. The cauſes of complaint appear in a letter concerning Sir *William Whitlock*'s bill for regulating of trials in caſes of high-treaſon, written in 1693, page 1. it ſays: "What good *Engliſhman* is not afflicted for the death both of *Eſſex* and *Raleigh*? Can any man that knows our laws, think Sir *Henry Vane* was fairly dealt with? That *Plunket* ought to have been tried twice? *Sidney* executed upon ſimilitude of hands, and one witneſs? Sir *Thomas Armſtrong* without a trial, before the outlawry compelled his coming in? *Aſhton* upon preſumptive treaſon? And *Anderton*, againſt the plain ſenſe of ſo many ſtatutes? The blood of theſe, and many more, cry for vengeance, and admoniſh us to provide againſt ſuch extravagancies hereafter. *Colledge* and *Corniſh* cry aloud for ſuch a bill. Had ſuch a ſtatute been in force, could the great Lord *Ruſſel* have died for only endeavouring to prevent the wild attempts of others? and becauſe Sir *Thomas Armſtrong* had viewed

viewed the guards? But it is needleſs to ſet down the ſeveral inſtances in other reigns, when the trials under this, afford but too pregnant reaſons to conclude the judges very untoward council for the priſoner, and that jurymen may be biaſſed by piques and animoſities: and alſo that well-meaning men of a jury ought to hear the law ſtated by ſuch of the robe as are not in the pay of the crown; not only becauſe the bench too often prevaricates, but becauſe the priſoners are often wearied out, as the great *Raleigh* was, with the clamorous harangues of the king's council, and ſo drop their defence, when their lungs (which are not ſo well breathed as thoſe of pleaders) fail them."

How ſtriking is the contraſt between the adminiſtration of juſtice at that period and at the preſent! At that time the judges held their commiſſions, during the pleaſure of the crown (*durante bene placito*) under the influence of which, their deciſions were ſuſpected not to flow from the pure principles of juſtice. In the year 1700, by ſtatute 13 *William* III. c. 2. "for the further limitation of the crown and better ſecuring the rights and liberties of the ſubject," it is declared that the judges' commiſſions ſhall be made, (not as formerly *durante bene placito;* but) *quamdiu bene ſe geſſerint*, during their good behaviour, and their ſalaries aſcertained and eſtabliſhed; but that it may be lawful to remove them on the addreſs of both houſes of parliament. Since that period and to the honour of the reign of his preſent majeſty *George the Third*, theſe proviſions have been completely carried into effect: his majeſty declaring from the throne to both houſes of parliament that he looked upon the independency and uprightneſs of the judges, as eſſential to the impartial adminiſtration of juſtice, as one of the beſt ſecurities to the rights and liberties of his loving ſubjects, and as moſt conducive to the honour of his crown; in order therefore to enable his majeſty to effectuate theſe wiſe, juſt and generous purpoſes of his royal heart, it was enacted 1 *Geo.* III. c. 23. A. D. 1760, That the judges commiſſions ſhall be continued notwithſtanding the demiſe of the crown (which was formerly held immediately to vacate them), and that their ſalaries ſhall be ſecured to them during the continuance of their commiſſions, of which they ſhall not be deprived but on the addreſſes of both houſes of parliament.

Thus then the independency of the judges is completely ſecured, and there now remains not the ſmalleſt foundation for ſuch an imputation on the uprightneſs of the bench, as it deſervedly received from the writer of the above letter.

As

As to the complaint contained in the ſame letter of the "clamorous harangues of the king's counſel," wearying and exhauſting priſoners until they drop their defence; inſtead of theſe we now ſee proſecutions, conducted with moderation, and the "clamorous harangues" ſo fatal to a fair diſtribution of juſtice adopted on the other ſide of the queſtion in oppoſition to the crown. And laſtly the cauſes of complaint reſpecting trials for high-treaſon, are now completely removed, as muſt have appeared to the reader in the courſe of this ſubject.

The CASE of JOHN TUTCHIN, for a Seditious Libel, entitled, "The Obſervator," at *Guildhall, London*, on the 4th of *November*, 1704. 3 *Annæ*.

JOHN TUTCHIN was charged by information which ſet forth that being a ſeditious perſon, and a daily inventor and publiſher of falſe news and ſeditious libels, to traduce the government, did, on the 30th of *May*, in the firſt year of her majeſty's reign, compoſe and publiſh a certain falſe, malicious, ſeditious, and ſcandalous libel, entitled, *The Obſervator;* wherein, among other things, were the following paſſages, No. 11. *Saturday*, the 30th of *May*, 1702. "At the ſame time we conſider the *French* king's ſucceſs in his bribery and corruption, we ought to lament the ſad ſtate of our own country, which affords ſo many inſtances of treachery. If we may judge, by our own national miſcarriages, perhaps no nation in *Europe* has felt the influences of *French* gold more than *England:* and worthy it is our greateſt lamentation, that our dear country ſhould be weakened by men of mercenary principles, when countries inferior to us in ſtrength and riches, are ſecured from attempts of this nature, only by the fidelity of their people. What is the reaſon that *French* gold has not affected *Holland* as well as *England*; but that their miniſtry is ſuch as is intirely in the intereſt of their country, and altogether incorruptible? They prefer men that are knowing in their poſts, and are active in the buſineſs; when in *England* we find offices for men, not men for offices; and a title of honour gives a man a title to a great employment, he is altogether ignorant

ignorant of. By this, and by preferring of men by intereſt and favour, has the exciſe, the cuſtoms, and other branches of the revenue, intolerably ſunk; and, by this means, has the navy of *England*, our chief ſupport, been hitherto perfectly bewitched: and can *Lewis* ſpend his money better, than in getting men into offices in *England*, who are either falſe or ignorant of the buſineſs, or are his friends?"

That on the 11th of *July* following, he publiſhed another *Obſervator*; wherein are theſe words: "And this is a prerogative of ſingular advantage to the people of *England*, in that their repreſentatives are the judges of the mal-adminiſtration of their governors: that they can call them in queſtion for the ſame, and can appoint ſuch to wear the crown who are fitteſt for government; which they have often done, and, indeed, which is the privilege of all free people, who are authorized by the laws of God and nature, to chuſe their own governors."

That on the 12th of *June*, in the ſecond year of the queen, he publiſhed another; wherein are theſe words: "Take one time with another, the miſmanagements of the navy have been a greater tax on the merchants, than the duties raiſed by parliament: we never had a better navy; but the wiſdom of the managers thereof is like a bottomleſs pit, paſt finding out."

That on the 16th of the ſame *June*, he publiſhed another; wherein are theſe words: "What avails it a man of learning and parts, to qualify himſelf for the ſervice of his country on the ocean? If he has knowledge enough to adviſe *Neptune* himſelf, if he has no intereſt, he ſhall have no preferment. How much does it look to our nation's diſadvantage, to have men in eminent ſtations in the navy, who have not ſo much as an idea, a notion, a thought, of naval affairs? To have men ſuperintend the building of our floating caſtles, who know not the nature of any part of the management? To have men employed in the victualling, who qualify themſelves for that poſt, by learning to write their names; which is, indeed, a poſt for a philoſopher bread to the ſea?"

That the 10th of July following, he publiſhed another *Obſervator;* wherein are theſe words: "*Countryman.* Truly, Maſter *Obſervator*, I have no very good news for you: Mr. *Daniel de Foe* has pleaded guilty to the indictment againſt him, for writing and publiſhing, "The ſhorteſt Way with the Diſſenters;" and he is ſentenced to ſtand three times in the pillory, to pay a fine of two hundred marks, and to find ſecurity for his good behaviour for ſeven years. *Obſervator.*

vator. The Court could do no otherwiſe than convict him upon his pleading guilty: *Habemus confitentem reum* is very often the voice of courts of judicature; it is the eaſe of judge and juries. If *Daniel de Foe* was in expectation of *Coleman*'s black box, he has found a pillory inſtead of it. I don't trouble my head about the cuſtom of giving the pillory to authors, which is the puniſhment of bakers. You talked juſt now of turning author; have a care of your candle; you ſee which is the ſhorteſt way with authors: you muſt all enter yourſelves in the regiment of Colonel *Foe*. The law of *England* directs, That no man ſhall be fined *ultra tenementum;* and, I make no queſtion, but the juſtice of the Court has fined Mr. *Foe* anſwerable to his eſtate: his ſecurity for his good behaviour for ſeven years, without doubt, was rationally conſidered, as to the legality thereof. For my part, I am only acquainted with the old laws of *England*, the ancient birthrights and immunities of *Engliſhmen*; this I take to be the foundation of new laws."

That on the 20th of *May*, 1704, he publiſhed another ſcandalous and ſeditious libel, entitled, *The Obſervator*; in which are contained theſe words: "*Countryman.* Maſter *Obſervator*, There is another plot againſt you. *Obſervator.* Pry'thee man, there is a plot againſt the queen, and the whole nation; is it any wonder then, that there are plots againſt me? The high-flyers are now plotting againſt every honeſt man in *England*: I'll tell you more of it the next time we meet. *Countryman.* I fancy ſome ſort of people plot againſt you, becauſe you endeavour to countermine their plots againſt the queen and nation. *Obſervator.* You are right enough; but that ſha'nt hinder me from detecting their deſigns, and from opening the people's eyes. But pr'ythee, what plot is this? *Countryman.* Why, Sir, it is a plot preparatory to your trial; and, if they can't affect this plot, I ſuppoſe you'll never be tried: they inſinuate into the citizens of *London*, that you have lately written very ſcandalouſly, maliciouſly, and treaſonably, and I do not know how many other lies, againſt them the ſaid citizens; and, by this means, they are minded to ſet your jurors againſt you. *Obſervator.* This is likely enough, they'll leave no ſtone unturned to ſuppreſs the truth: I underſtand I ſhould have been proſecuted by bill the laſt ſeſſions; but the high-flyers did not like the jury: nay, they ſay, they don't like the two ſheriffs, becauſe they won't pack juries, to find innocent men guilty."

The jury found *Tutchin* guilty; but the judgment was afterwards arreſted, on a defect in the proceedings. *State Trials*, Vol. V. p. 528.

The CASE of DR. HENRY SACHEVERELL, for Seditious Libels, before the Houſe of Lords, in the months of *February* and *March*, 7 & 8 *Ann.* A. D. 1709.

THE Doctor was proſecuted by articles of impeachment exhibited by the Houſe of Commons. The preamble whereof recited, That the late king *William*, when prince of *Orange*, undertook, with an armed force, a glorious enterprize, for delivering this kingdom from popery and arbitrary power; in which he was joined and aſſiſted by many ſubjects of this realm, well affected to their country: and that God being pleaſed to crown it with ſucceſs, the late happy revolution took effect, and was eſtabliſhed: and whereas the ſaid glorious enterprize had been approved by ſeveral acts of parliament, declared to be neceſſary, and that the ſame ought to be juſtified; and the happy conſequences of it were the enjoyment of God's true religion, and the laws and liberties of the kingdom; the uniting the ſubjects in intereſt and affection, by a toleration of Diſſenters; the preſervation of her majeſty, the ſucceſſion of the crown in the proteſtant line, and the union of the two kingdoms: and whereas the Lords and Commons, did, by their addreſs of 17 *Dec.* 1705, lay before her majeſty their reſolution, That the Church of *England*, which was reſcued from the extremeſt danger by king *William* III. was, by God's bleſſing, under her majeſty in a moſt ſafe and flouriſhing condition; and that whoever goes about to inſinuate, that the church is in danger under her majeſty's adminiſtration, is an enemy to the queen, the church, and kingdom: and did beſeech her majeſty to take effectual meaſures for puniſhing the authors of ſuch reports: and her majeſty iſſued her proclamation accordingly; yet the ſaid *Henry Sacheverell* had preached two ſermons, and printed them, with a wicked, malicious, and ſeditious intention to ſubvert her majeſty's government and the proteſtant ſucceſſion;

ceſſion; to defame her majeſty's adminiſtration, to aſperſe the memory of his late majeſty, to condemn the revolution, arraign the reſolutions of both houſes of parliament, create jealouſies and diviſions among her majeſty's ſubjects, and incite them to ſedition and rebellion.

Art. 1. That the ſaid *Henry Sacheverell*, in his ſermon preached at St. *Paul*'s, doth ſuggeſt and maintain, That the neceſſary means uſed to bring about the revolution, were odious and unjuſtifiable: that his late majeſty in his declaration, diſclaimed the leaſt imputation of reſiſtance: and that to impute reſiſtance to the revolution, is to caſt black and odious colours upon his late majeſty and the ſaid revolution.

Art. 2. Was in ſubſtance, That he had ſuggeſted and maintained, That the toleration was unreaſonable, and the allowance of it unwarrantable; and reflected on archbiſhop *Grindall*.

Art. 3. Imported, That he did falſely and ſeditiouſly ſuggeſt and aſſert, That the church of *England* was in great peril and adverſity under her majeſty's adminiſtration, contrary to the votes of both houſes.

Art. 4. That he did falſely and maliciouſly ſuggeſt, That her majeſty's adminiſtration, both in eccleſiaſtical and civil affairs, tended to the deſtruction of the Conſtitution: and, that there were men of characters and ſtations in church and ſtate, who were falſe brethren; and did themſelves undermine, and betray, and encourage and impower others to undermine and betray the Conſtitution: that as a public incendiary, he fomented diviſions, and excited her majeſty's ſubjects to arms and violence: and that his ſeditious ſuggeſtions might make the ſtronger impreſſions, he did wreſt and pervert divers paſſages of holy ſcripture.

All which they were ready to prove, from the ſaid ſermons. There were 120 peers preſent, of whom 69 found the Doctor guilty, and 51 not guilty.

The Lord Chancellor pronounced the following judgment, viz. "That you, *Henry Sacheverell*, Doctor in divinity, ſhall be, and you are hereby enjoined not to preach during the term of three years next enſuing: that your two printed ſermons, referred to by the impeachment of the Houſe of Commons, ſhall be burnt before the *Royal Exchange* in *London*, between the hours of one and two o'clock, on the 27th of this inſtant *March*, by the hands of the common hangman, in the preſence of the Lord Mayor of *London*, and the ſheriffs of *London* and *Middleſex*." And the Doctor being

withdrawn, an order was made, directed to the Lord Mayor and ſheriffs to ſee the ſentence executed. *State Trials*, Vol. V. p. 641.

The CASE of JOHN MATTHEWS, Printer, for a Treaſonable Libel, at the *Old Bailey*, *October* 30, 1719. 12 *Ann.*

THE charge againſt *Matthews* was founded on the ſtatute of 6 *Ann.* c. 7. entitled, "An act for the ſecurity of her majeſty's perſon and government, and of the ſucceſſion of the crown of *Great Britain* in the proteſtant line," paſſed at the time of a projected invaſion in favour of the Pretender, which declares, That if any perſon ſhall maliciouſly, adviſedly, directly, by writing or printing, maintain and affirm, that any other perſon hath any right or title to the crown of this realm, otherwiſe than according to the act of ſettlement, &c. ſuch perſon ſhall be guilty of high-treaſon. Vide ante, p. 201, 202.

He was charged with having maliciouſly, adviſedly and traitorouſly printed a treaſonable libel, entitled, *Ex ore tuo te judico, Vox Populi, Vox Dei*, of and concerning the perſon in the life-time of king *James the Second*, late king of *England*, &c. pretending to be the prince of *Wales*, and after the deceaſe of the ſaid late king pretending to be, and taking upon himſelf, the ſtile and title of king of *England*, by the name of *James the Third*, and of and concerning his right to the crown of *Great Britain*, he did maliciouſly, adviſedly, directly and traitorouſly declare, maintain and affirm, in one part thereof, in theſe words, "That from the ſolemnity of the Chevalier's (meaning the Pretender's) birth, the moral impoſſibility of putting an impoſtor upon the nation after the manner pretended, and the diſappointment in the attempt of proving him ſo, I think it's demonſtration, if *hereditary right* be any recommendation, he has that to plead in his favour; and all aſſertors of limited monarchy muſt allow, that ought to be preferred, if the perſon having it is endowed with other qualities fit to govern: and the great opinion all courts have of this prince's virtue ſhews, he only wants to be known by us to be admired; and we only

only want the enjoyment of him to make us happy;" and in another part thereof, in theſe words, I (meaning himſelf the ſaid *John Matthews*) will conclude with three remarks; firſt, "That every aſſertor of hereditary right muſt be a jacobite." Secondly, "That every whig that makes *vox populi* his rule of government muſt be ſo." Thirdly, "Every aſſertor of limited monarchy muſt be ſo; the Chevalier (meaning the Pretender) being endowed with all princely virtues, ſo that all rights concur in him." There is another part of the indictment generally, that he the ſaid *John Matthews* the ſame day and year, at *London* aforeſaid, in the pariſh and ward aforeſaid, in the ſame libel, maliciouſly, adviſedly and traitorouſly did declare, maintain and affirm, that the perſon in the life-time of *James the Second*, late king of *England*, pretending to be the prince of *Wales*, and after the deceaſe of the ſaid late king, pretending to be and taking upon himſelf the ſtile and title of king of *England* by the name of *James the Third*, hath a right to the crown of *Great Britain*.

He received the uſual ſentence in caſes of high-treaſon, and was executed at *Tyburn*. *November* 6, 1720. *State Trials*, Vol. IX. p. 680.

The CASE of RICHARD FRANKLIN, for a Seditious Libel, in the Court of *King's-Bench*, *January* 2, 1731[a]. *Geo.* II.

HE was charged by the information, with being a ſeditious and ill-diſpoſed perſon, diſaffected to his majeſty and his government, and a perpetual publiſher of ſcandalous libels, to diſturb the public peace and tranquillity; and that he publiſhed a falſe, ſcandalous and ſeditious libel, (entitled, "No. 235. The Country Journal; or the Craftſman. By *Caleb D'Anvers*, of *Gray's-Inn*, Eſq; *Saturday*, *January* 2, 1730.") of and concerning his majeſty *George the Second*, and his adminiſtration and ſtate of public affairs of this kingdom; and of and concerning his principal

[a] This caſe is alluded to by Lord *Mansfield* in giving judgment in the Dean of St. *Aſaph*'s caſe; as the famous *Hague* letter publiſhed in the Craftſman, a celebrated party paper in oppoſition to the miniſtry of Sir *Robert Walpole*. Vid. ante, p. 45.

pal officers and miniſters of ſtate, &c. to the tenor following, to wit: Extract of a private letter from the *Hague*. "A rumour hath been for ſome time privately ſpread about, and begins to gain credit here, that a miſunderſtanding will ſoon diſcover itſelf between the allies of *Seville*;" (meaning his ſaid preſent majeſty, the *French* king, and the king of *Spain*) "and that certain miniſters" (meaning the ſaid principal officers and miniſters of his ſaid majeſty, employed and intruſted in the difficult affairs of ſtate) "having at length found out, that too cloſe an union with *France*, and a war upon the foot of the treaty of *Seville*, is quite againſt the grain of the people, are endeavouring to bring about an accommodation with the emperor, and to undo every thing they have been doing for theſe five years paſt. If this ſhould prove true, it will certainly redound very much to the honour of thoſe gentlemen, who have ſo vigorouſly oppoſed the late meaſures; and the miniſters, who have not only concerted and purſued theſe meaſures, but loaded all oppoſition to them with the foulеſt imputations, will be obliged to take a great deal of ſhame to themſelves; for what can be a ſtronger condemnation of their own paſt conduct, or the conduct of thoſe whom they have employed to write in their cauſe, than to ſee them wheel about all on a ſudden, and purſue meaſures directly oppoſite, which have been pointed out to them, for ſeveral years together, by their adverſaries; and for which they have repreſented thoſe gentlemen, in the moſt opprobrious colours, as factious incendiaries, Germanized patriots, and enemies to their country? What can be more ridiculous than to ſee them deſert one ally, whoſe good faith, ſincerity, and even cordiality of friendſhip, they have ſo often extolled, and at laſt run into the arms of another, whom they have ſo induſtriouſly ſet forth as the moſt diſhonourable, ungrateful, and perfidious prince? They muſt have altered their opinion of this prince very much (if this report is true), and ſeem to rely upon his good-nature, putting themſelves thus abſolutely in his power; for if he ſhould refuſe to deal with them, after the uſage he hath received, they will be broke with all the courts of *Europe*; and he cannot be inſenſible of their perfidy to others, at the ſame time that he is treating with them. How will they be able to juſtify thoſe vaſt expences which they have already brought upon their country, by an obſtinate perſeverance in other meaſures, till the laſt extremity, as well as thoſe farther expences and hazards, in which ſuch a precipitate alteration

ation of counſels, in the preſent circumſtances of *Europe*, will certainly involve it? For though the meaſure, which is now ſaid to be ſecretly carrying on, was certainly the moſt eligible, whilſt they remained unembarraſſed with engagements of another kind; and though it muſt be confeſſed to be very deſirable at preſent; yet it ſeems to be attended with very fatal conſequences, and almoſt inſuperable difficulties. The people, of whom I am ſpeaking, had their hands at liberty five years ago, and might have entered into what meaſures they pleaſed with the emperor, without giving umbrage, or any juſt reaſon of complaint, to other courts; but at preſent they cannot do it, without an infraction of ſolemn treaties, and drawing upon their country the reſentments which uſually attend violations of faith. One immediate effect of this reſentment may be the interruption of trade, and the ſeizure of that vaſt pledge, which *Spain* hath at this time in her hands; ſo that the only pretended good effect of their former conduct, may be abſolutely defeated by their preſent ſcheme. Another neceſſary effect (for ſo I think I may call it) of ſuch a meaſure, at preſent, will be a conjunction of *France* and *Spain*; and a certain court may have the mortification to ſee thoſe two crowns united againſt them more ſtrongly than ever, by their extraordinary management, after they have ſpent ſo many millions to prevent it. I am far from deſigning to inſinuate from hence, that an accommodation with the emperor is a wrong meaſure: on the contrary, I wiſh it had been thought a right meaſure long ago. My only intention is to ſhew how difficult, in my apprehenſion, the conduct of ſome miniſters hath rendered it to their country, as well as diſhonourable to themſelves, by carrying along with it the ſevereſt cenſure of their own conduct, and the ſtrongeſt juſtification of their adverſaries, againſt all the aſperſions which have been caſt upon them."

The jury found him guilty, and he was ſentenced to pay a fine of 100l. to be impriſoned a year, and to find ſecurity for his good behaviour for ſeven years. *State Trials*, Vol. IX. p. 255.

THE next Caſe is that of *Woodfall*, 11 *Geo.* II. A. D. 1770, who was proſecuted for publiſhing in his Newſpaper, the Public Advertizer, a ſeditious libel ſigned *Junius*. This libel is contained in a letter addreſſed to the king, which is contained in *Junius*'s Letters, and dated *December*

December 19, 1769—to which the reader is referred. The verdict of the jury was that he was "Guilty of the printing and publishing *only*."

The question on this verdict was, whether, by any possibility, the word "only" could have a meaning which could affect or contradict the verdict. The legal import of the verdict was argued before the Court of *King's-Bench*; and Lord *Mansfield*, in giving the determination of the Court, stated the above question—his lordship, after confirming the usual direction that had been given by the judges to the jury, and which it has been enacted by the late act of parliament shall no more be given, proceeded as follows: "If they (the jury) meant to say "they did not find it a *libel*," or "did not find the *epithets*," or "did not find any *express* malicious intent;" it would *not* affect the verdict: because *none of these* things were to be proved, or found *either* way." If by "only," they meant to say, "that they did *not* find the meaning *put upon the paper* by the information:" they should have acquitted him.

If they had expressed this to be their meaning, the verdict would have been *inconsistent* and *repugnant*: for they ought *not* to find the defendant guilty, *unless* they find the *meaning put upon the paper by the information*: and judgment of *acquittal* ought to have been entered up.

If they had *expressed* their meaning, in any of the *other* ways, the verdict would *not* have been affected; and *judgment* ought to be entered upon it.

It is impossible to say, with certainty, "*what* the jury *did* mean." Probably, they had *different* meanings.

If they could possibly mean *that* which, *if expressed*, would *acquit* the defendant, he ought not to be concluded by this verdict.

It is possible, *some* of them might mean, not to find the whole sense and explanation put upon the paper by the innuendoes in the information.

If a doubt arises from an ambiguous and unusual word in the verdict, the Court ought to lean in favour of a new trial.

We are under the *less* difficulty; because, in favour of a *defendant*, though the verdict be *full*, the Court may grant a new trial.

And we are all of opinion, upon the whole of the case, that there should be a new trial.

There was no further prosecution.

The

The CASE of JOHN HORNE, Eſq; for a Seditious Libel, in the *King's-Bench*, 4 *July*, 1777.

THE charge againſt *John Horne*, as ſtated in the information filed againſt him by *Edward Thurlow*, attorney general, was for writing and publiſhing a falſe and ſeditious libel of and concerning his majeſties government and the employment of his troops, according to the tenor and effect following. "*King's-Arms* tavern, *Cornhill*, *June* 7, 1775. At a ſpecial meeting this day of ſeveral members of the conſtitutional ſociety, during an adjournment, a gentleman propoſed that a ſubſcription ſhould be immediately entered into by ſuch of the members preſent who might approve the purpoſe, for raiſing the ſum of 100l. to be applied to the relief of the widows, orphans and aged parents of our beloved *American* fellow-ſubjects, who, faithful to the character of *Engliſhmen*, preferring death to ſlavery, were for that reaſon only inhumanly murdered by the king's troops at or near *Lexington* and *Concord*, in the province of *Maſſachuſets* on the nineteenth of laſt *April*; which ſum being immediately collected, it was thereupon reſolved that Mr. *Horne* do pay to-morrow into the hands of Meſſ. *Brownes* and *Collinſon*, on account of Dr. *Franklin*, the ſaid ſum of 100l. and that Dr. *Franklin* be requeſted to apply the ſame to the above-mentioned purpoſe; *John Horne*." This advertiſement was inſerted in ſeveral news papers: the jury found him guilty.

The ſentence againſt Mr. *Horne* was 200l. fine, impriſonment 12 months, and to find ſureties for his good behaviour for three years after the determination of his impriſonment himſelf in 400l. and two ſureties in 200l. each.

The CASE of the DEAN of St. ASAPH, on *Friday* the 6th of *Auguſt*, 1784.

THE *Dean* was charged with being a perſon of a turbulent diſpoſition, and deſigning to draw the government into great ſcandal, and to incite the king's ſubjects by

by force and violence to alter the ſame, did publiſh a falſe and ſeditious libel, in the form of a ſuppoſed dialogue between a ſuppoſed gentleman and a ſuppoſed farmer: in which was contained the wicked, malicious and ſcandalous matters following, to wit.

"The principles of government, in a dialogue between a gentleman and a farmer."

F. Why ſhould humble men, like me, ſign or ſet marks to petitions of this nature? It is better for us farmers to mind our huſbandry, and leave what we cannot comprehend to the king and parliament.

G. You can comprehend more than you imagine; and, as a free member of a free ſtate, have higher things to mind than you may conceive.

F. If by free you mean out of priſon, I hope to continue ſo, as long as I can pay my rent to the 'ſquire's bailiff; but what is meant by a free ſtate?

G. Tell me firſt what is meant by a club in the village, of which I know you to be a member.

F. It is an aſſembly of men, who meet after work every *Saturday* to be merry and happy for a few hours in the week.

G. Have you no other object but mirth?

F. Yes; we have a box, into which we contribute equally from our monthly or weekly ſavings, and out of which any members of the club are to be relieved in ſickneſs or poverty; for the pariſh officers are ſo cruel and inſolent, that it were better to ſtarve than apply to them for relief.

G. Did they, or the 'ſquire, or the parſon, or all together, compel you to form this ſociety?

F. Oh! no—we would not be compelled; we formed it by our own choice.

G. You did right—But have you not ſome head or preſident of your club?

F. The maſter for each night is choſen by all the company preſent the week before.

G. Does he make laws to bind you in caſe of ill temper or miſbehaviour?

F. He make laws! He bind us! No; we have all agreed to a ſet of equal rules, which are ſigned by every new comer, and were written in a ſtrange hand by young *Spelman*, the lawyer's clerk, whoſe uncle is a member.

G. What ſhould you do, if any one member were to inſiſt on becoming perpetual maſter, and on altering your rules at his arbitrary will and pleaſure?

F. We ſhould expel him.

G. What, if he were to bring a ſerjeant's guard, when the

the militia are quartered in your neighbourhood, and inſiſt upon your obeying him.

F. We ſhould reſiſt, if we could; if not the ſociety would be broken up.

G. Suppoſe that, with his ſerjeant's guard, he were to take the money out of the box, or out of your pockets?

F. Would not that be a robbery?

G. I am ſeeking information from you. How ſhould you act on ſuch an occaſion?

F. We ſhould ſubmit, perhaps, at that time; but ſhould afterwards try to apprehend the robbers.

G. What, if you could not apprehend them?

F. We might kill them, I ſhould think; and, if the king would not pardon us, God would.

G. How could you either apprehend them, or, if they reſiſted, kill them, without a ſufficient force in your own hands?

F. Oh! we are all good players at ſingle ſtick, and each of us has a ſtout cudgel or quarterſtaff in the corner of his room.

G. Suppoſe that a few of the club were to domineer over the reſt, and inſiſt upon making laws for them———

F. We muſt take the ſame courſe; except that it would be eaſier to reſtrain one man, than a number; but we ſhould be the majority with juſtice on our ſide.

G. A word or two on another head. Some of you I preſume, are no great accountants,

F. Few of us underſtand accounts; but truſt old *Lilly* the ſchool-maſter, whom we believe to be an honeſt man; and he keeps the key of our box.

G. If your money ſhould in time amount to a large ſum, it might not perhaps be ſafe to keep it at his houſe, or in any private houſe.

F. Where elſe ſhould we keep it?

G. You might chuſe to put it into the funds, or to lend it the 'ſquire, who has loſt ſo much lately at *Newmarket*, taking his bond or ſome of his fields as your ſecurity for payment with intereſt.

F. We muſt in that caſe confide in young *Spelman*, who will ſoon ſet up for himſelf, and, if a lawyer can be honeſt, will be an honeſt lawyer.

G. What power do you give to *Lilly*, or ſhould you give to *Spelman*, in the caſe ſuppoſed?

F. No power. We ſhould give them both a due allowance for their trouble, and ſhould expect a faithful account for all they had done for us.

G. Honeſt

G. Honeſt men may change their nature. What, if both or either of them were to deceive you?

F. We ſhould remove them, put our truſt in better men, and try to repair our loſs.

G. Did it never occur to you, that every ſtate or nation was only a great club?

F. Nothing ever occurred to me on the ſubject; for I never thought about it.

G. Though you never thought before on the ſubject, yet you may be able to tell me, why you ſuppoſe men to have aſſembled, and to have formed nations, communities, or ſtates, which all mean the ſame thing.

F. In order, I ſhould imagine, to be as happy as they can, while they live.

G. By happy do you mean merry only?

F. To be merry as they can without hurting themſelves or their neighbours, but chiefly to ſecure themſelves from danger, and to relieve their wants.

G. Do you believe, that any king or emperor compelled them ſo to aſſociate?

F. How could one man compel a multitude? A king or an emperor, I preſume, is not born with a hundred hands.

G. When a prince of the blood ſhall in any country be ſo diſtinguiſhed by nature, I ſhall then, and then only, conceive him to be a greater man than you. But might not an army, with a king or general at their head, have compelled them to aſſemble?

F. Yes; but the army muſt be formed by their own choice. One man or a few can never govern many without their conſent.

G. Suppoſe, however, that a multitude of men, aſſembled in a town or city, were to chuſe a king or governor, might not they give him high power and authority?

F. To be ſure; but they would never be ſo mad, I hope, as to give him a power of making their laws.

G. Who elſe ſhould make them?

F. The whole nation or people.

G. What, if they diſagreed?

F. The opinion of the greater number, as in our village-clubs, muſt be taken and prevail.

G. What could be done if the ſociety were ſo large, that all could not meet in the ſame place?

F. A greater number muſt chuſe a leſs.

G. Who ſhould be the chuſers?

F. All, who are not upon the pariſh. In our club, if a man

man aſks relief of the overſeer, he ceaſes to be one of us, becauſe he muſt depend on the overſeer.

G. Could not a few men, one in ſeven for inſtance, chuſe the aſſembly of law-makers as well as a larger number?

F. As conveniently, perhaps; but I would not ſuffer any man to chuſe another, who was to make laws, by which my money or life might be taken from me.

G. Have you a freehold in any county, of forty ſhillings a year?

F. I have nothing in the world but my cattle, implements of huſbandry, and houſhold goods, together with my farm, for which I pay a fixed rent to the 'ſquire.

G. Have you a vote in any city or borough?

F. I have no vote at all; but am able by my honeſt labour to ſupport my wife and four children; and, whilſt I act honeſtly, I may defy the laws.

G. Can you be ignorant; that the parliament, to which members are ſent by this county, and by the next market-town, have power to make new laws, by which you and your family may be ſtripped of your goods, thrown into priſon, and even deprived of life?

F. A dreadful power! I never made enquires, having buſineſs of my own, concerning the buſineſs of parliament, but imagined, that the laws had been fixed for many hundred years.

G. The common laws, to which you refer, are equal, juſt, and humane; but the king and parliament may alter them when they pleaſe.

F. The king ought therefore to be a good man, and the parliament to conſiſt of men equally good.

G. The king alone can do no harm; but who muſt judge the goodneſs of the parliament-men?

F. All thoſe whoſe property, freedom, and lives may be affected by their laws.

G. Yet ſix men in ſeven, who inhabit this kingdom, have, like you, no votes; and the petition which I deſired you to ſign, has nothing for its object, but the reſtoration of you all to the right of chuſing thoſe law-makers, by whom your money or your lives may be taken from you. Attend, while I read it diſtinctly.

F. Give me your pen—I never wrote my name, ill as it may be written, with greater eagerneſs.

G. I applaud you, and truſt, that your example will be followed by millions. Another word before we part. Recollect your opinion about your club in the village, and tell me what ought to be the conſequence, if the king alone were

to

to inſiſt on making laws, or on altering them at his will and pleaſure.

F. He too muſt be expelled.

G. Oh! but think of his ſtanding army, and of the militia, which now are his in ſubſtance, though ours in form.

F. If he were to apply that force againſt the nation, they would and ought to reſiſt him, or the ſtate would ceaſe to be a ſtate.

G. What, if the great accountants and great lawyers, the *Lillys* and *Spelmans* of the nation, were to abuſe their truſt, and cruelly injure, inſtead of faithfully ſerving, the public?

F. We muſt requeſt the king to remove them, and make trial of others, but none ſhould implicitly be truſted.

G. But what, if a few great lords or wealthy men were to keep the king in ſubjection, yet exert his force, laviſh his treaſure, and miſuſe his name, ſo as to domineer over the people and manage the parliament?

F. We muſt fight for the king and ourſelves.

G. You talk of fighting, as if you were ſpeaking of ſome ruſtick engagement at a wake; but your quarter-ſtaffs would avail you little againſt bayonets.

F. We might eaſily provide ourſelves with better arms.

G. Not ſo eaſily; when the moment of reſiſtance came you would be deprived of all arms; and thoſe who ſhould furniſh you with them, or exhort you to take them up, would be called traitors, and probably put to death.

F. We ought always, therefore, to be ready; and keep each of us a ſtrong firelock in the corner of his bed-room.

G. That would be legal as well as rational. Are you, my honeſt friend, provided with a muſket?

F. I will contribute no more to the club, and purchaſe a firelock with my ſavings.

G. It is not neceſſary——I have two, and will make you a preſent of one with complete accoutrements.

F. I accept it thankfully, and will converſe with you at your leiſure on other ſubjects of this kind.

G. In the mean while, ſpend an hour every morning in the next fortnight in learning to prime and load expeditiouſly, and to fire and charge with bayonet firmly and regularly. I ſay every morning; becauſe, if you exerciſe too late in the evening, you may fall into ſome of the legal ſnares, which have been ſpread for you by thoſe gentlemen, who would rather ſecure game for their table, than liberty for the nation.

F. Some of my neighbours, who have ſerved in the militia,

litia, will readily teach me; and perhaps, the whole village may be perſuaded to procure arms, and learn their exerciſe.

G. It cannot be expected, that the villagers ſhould purchaſe arms; but they might eaſily be ſupplied, if the gentry of the nation would ſpare a little from their vices and luxury.

F. May they turn to ſome ſenſe of honour and virtue!

G. Farewell, at preſent; and remember, "that a free ſtate is only a more numerous and more powerful club, and that he only is a free man, who is member of ſuch a ſtate."

F. Good morning, Sir! You have made me wiſer and better than I was yeſterday: and yet, methinks, I had ſome knowledge in my own mind of this great ſubject, and have been a politician all my life without perceiving it.

The verdict of the jury was, "Guilty of publiſhing, but whether a libel or not they do not find." This Caſe afterwards came before the Court of *King's-Bench*. See ante, page 42. The judgment was arreſted on a defect in the indictment.

The CASE of THOMAS PAINE, for a Seditious Libel, at *Guildhall*, the 18th of *December* 1792.

THE charge againſt him was for ſeditiouſly and wickedly publiſhing a book, called "Second Part of the Rights of Man," containing among others the following paſſages. Page 21, "All hereditary government is in its nature tyranny. An heritable crown, or an heritable throne, or by what other fanciful name ſuch things may be called, have no other ſignificant explanation, than that mankind are heritable property. To inherit a government is to inherit the people, as if they were flocks and herds!"

In page 47, ſpeaking of the Congreſs of *Philadelphia* in 1787, and of the regal power, which, under a different modification, prevails in that country, "This convention," he ſays, "met at *Philadelphia*, in *May* 1787, of which General *Waſhington* was elected preſident. He was not at that time connected with any of the ſtate governments,

or

or with Congreſs. He delivered up his commiſſion when the war ended, and ſince then had lived a private citizen.

"The convention went deeply into all the ſubjects; and having, after a variety of debate and inveſtigation, agreed among themſelves upon the ſeveral parts of a federal conſtitution, the next queſtion was the manner of giving it authority and practice.

"For this purpoſe they did not, like a cabal of courtiers, ſend for a *Dutch* Stadtholder, or a *German* Elector, but they referred the whole matter to the ſenſe and intereſt of the country.

"They firſt directed, that the propoſed conſtitution ſhould be publiſhed: ſecondly, that each ſtate ſhould elect a convention, expreſsly for the purpoſe of taking it into conſideration, and of ratifying or rejecting it; and that as ſoon as the approbation and ratification of any nine ſtates ſhould be given, that thoſe ſtates ſhould proceed to the election of their proportion of members to the new federal government; and that the operation of it ſhould then begin, and the former federal government ceaſe."

The next is in page 52; he expreſſes himſelf in this manner:

"The hiſtory of the *Edwards* and the *Henries*, and up to the commencement of the *Stuarts*, exhibits as many inſtances of tyranny as could be acted within the limits to which the nation had reſtricted it. The *Stuarts* endeavoured to paſs thoſe limits, and their fate is well known. In all thoſe inſtances we ſee nothing of a conſtitution, but only of reſtrictions on aſſumed power."

"After this, another *William*, deſcended from the ſame ſtock, and claiming from the ſame origin, gained poſſeſſion; and of the two evils, *James* and *Willium*, the nation preferred what it thought the leaſt, ſince from circumſtances it muſt take one. The act called the Bill of Rights comes here into view. What is it but a bargain, which the parts of the government made with each other, to divide power, profits, and privileges? You ſhall have ſo much, and I will have the reſt; and with reſpect to the nation it is ſaid, For your ſhare, you ſhall have the right of petitioning. This being the caſe, the Bill of Rights is more properly a bill of wrongs and of inſult. As to what was called the convention parliament—it was a thing that made itſelf, and then made the authority by which it acted. A few perſons got together, and called themſelves by that name. Several of them had never been elected, and none of them for the purpoſe.

"From

" From the time of *William*, a ſpecies of government aroſe, iſſuing out of this coalition Bill of Rights; and more ſo, ſince the corruption introduced at the *Hanover* ſucceſſion, by the agency of *Walpole*, that can be deſcribed by no other name than a deſpotic legiſlation."

In page 56, he ſays, " The attention of the government of *England*," (for I rather chuſe to call it by this name, than the *Engliſh* government) " appears, ſince its political connection with *Germany*, to have been ſo completely engroſſed and abſorbed by foreign affairs, and the means of raiſing taxes, that it ſeems to exiſt for no other purpoſe."

In page 63, " With reſpect to the two houſes, of which the *Engliſh* parliament is compoſed, they appear to be effectually influenced into one; and as a legiſlature is to have no temper of its own, the miniſter, whoever he at any time may be, touches it as with an opium wand, and it ſleeps obedience."

" Wretched as the ſtate of repreſentation is in *England*, it is manhood compared with the houſe of Lords; and ſo little is this nick-named houſe regarded, that the people ſcarcely enquire at any time what it is doing. It appears alſo to be moſt under influence, and the fartheſt removed from the general intereſt of the nation."

In page 107, he proceeds, " The crown very truly itſelf ſignifies a nominal office of a million ſterling a year, the buſineſs of which conſiſts in receiving the money. Whether the perſon be wiſe or fooliſh, ſane or inſane, a native or a foreigner, matters not. Every miniſtry acts upon the ſame idea that Mr. *Burke* writes, namely, that the people muſt be hoodwinked, and held in ſuperſtitious ignorance by ſome bugbear or other, and what is called the Crown anſwers this purpoſe, and therefore it anſwers all the purpoſes to be expected from it. This is more than can be ſaid of the other two branches."

In page 108, " This is the hazard to which this office is expoſed in all countries; not from any thing that may happen to the man, but what may happen to the nation—the danger of its coming to his ſenſes."

In page 116, " I happened to be in *England* at the celebration of the centenary of the Revolution of 1688. The characters of *William* and *Mary* have always appeared to me deteſtable, the one ſeeking to deſtroy his uncle, and the other her father, to get poſſeſſion of power themſelves; yet, as the nation was diſpoſed to think ſomething of that event, I felt hurt at ſeeing it aſcribe the whole reputation of it to a man who had undertaken it as a job, and who, be-

ſides what he otherwiſe got, charged 600,000l. for the expence of the little fleet that brought him from *Holland*. *George the Firſt* acted the ſame cloſe-fiſted part as *William* had done, and bought the duchy of *Bremin* with the money he got from *England*, 250,000l. over and above his pay as king; and having thus purchaſed it at the expence of *England*, added it to the *Hanoverian* dominions for his own private profit.—In fact, every nation that does not govern itſelf, is governed as a job. *England* has been the prey of jobs ever ſince the Revolution."

In page 161, it is ſaid, "That fraud, hypocriſy, and impoſition of governments, are now beginning to be too well underſtood to promiſe them any long career. The farce of monarchy and ariſtocracy, in all countries, is following that of chivalry, and Mr. *Burke* is dreſſing for the funeral. Let it then paſs quietly to the tomb of all other follies, and the mourners be comforted.

"The time is not very diſtant when *England* will laugh at itſelf for ſending to *Holland*, *Hanover*, *Zell*, or *Brunſwick* for men, at the expence of a million a year, who underſtood neither her laws, her language, nor her intereſt, and whoſe capacities would ſcarcely have fitted them for the office of a pariſh conſtable."

Laſtly, he ſays of king *William the Third*, and of the two king *Georges*, and of the preſent ſovereign on the throne. —"If government could be truſted to ſuch hands, it muſt be ſome eaſy and ſimple thing indeed, and materials fit for all the purpoſes may be found in every town and village."

The jury found him guilty immediately, and without hearing the reply of the Attorney General or the ſumming up of the judge.

WE have now finiſhed this Collection of Accuſations for *Treaſonable and Seditious Libels and Speeches:* and we muſt be content to confeſs that there is no ſubject exiſting on which the labours of the ſtudent are more unlikely to be rewarded than on this: the queſtions, What is a libel? Where does the liberty of the preſs end, and where does its licentiouſneſs begin? can no more be reſolved by the reader now, than before he commenced the ſubject: the truth is that they are incapable of being defined by any terms or ideas, ſo as to afford an abſtract rule of conduct or deciſion for men to be guided by. If it be ſaid that a libel is a writing tending

tending to diſturb the peace, good order and tranquillity of ſociety: for any twelve men that believe any ſpecific writing to poſſeſs this tendency, the ſame number may be found who believe it to poſſeſs qualities directly the reverſe. The deciſion of this important queſtion therefore depends only on the opinions, paſſions and political prejudices of men, than which nothing can be more various, uncertain and contradictory. It cannot be doubted but that all the inhabitants of *Great-Britain* are friends in a more or leſs degree to the liberty of the preſs; but the apprehenſion of thoſe who dread the fatal conſequences of its licentiouſneſs, will always be inſulted by the clamours of thoſe who for a paltry and temporary popularity affect a more than ordinary attachment to it. It happens in the preſent day that the almoſt univerſal opinion of the kingdom is, that the offspring of the preſs having filled every corner of the regions of genuine liberty, have been wandering in prodigious ſwarms in the realms of licentiouſneſs. The conſequence of this general opinion is that there is alſo a general ſpirit prevailing, ſupported by aſſociations, to correct, or if poſſible to put a total ſtop to this ſtrange and dangerous emigration. One of the principal cauſes therefore of complaint now made by the oſtenſible advocates for the liberty of the preſs, is that this ſpirit will be fatal to the "boaſted trial by the country, if the country is thus to become both informer and accuſer. "Where," (ſay they) "is the mild, complacent, relenting countenance of the jury, for trial, that laſt conſolation which the humanity of *England*, never denied, even to men taken in arms againſt her laws." This is undoubtedly a moſt ſerious conſideration—No man but muſt lament to ſee popular frenzy and party animoſities mingling among the deliberations of a jury: but is it not ſingular that he whoſe ſeducing eloquence was firſt exerted to place in a jury the power of deliberation on queſtions of libels, ſhould be the firſt to complain of the danger reſulting from it?

Happily for us at preſent the only danger is that the puniſhments of a few reſtleſs ſcribblers, venting their ſpleen and rancour, may be founded in the reſentment, as much as in the cool and unbiaſſed judgment of juries. This is the only danger now to be dreaded from the prevailing ſpirit of the kingdom againſt the licentiouſneſs of the preſs, and from the numerous aſſociations to ſupport and keep alive that ſpirit. Popular enthuſiaſm can never be recommended as an engine for the accompliſhment of even the beſt political views: if however its effects are ever innocent,

it is when it is directed to the ſupport of eſtabliſhed orders and conſtitutions, univerſally acknowledged as good and productive of all the comforts of ſocial combinations. But the objects of this ſpirit of the times, of this popular enthuſiaſm are changeable, the time may come when an affection for conſtituted authorities and a love of order and tranquillity may be changed into a deſire for their deſtruction. Should ſuch an unhappy ſpirit as this ever prevail in theſe kingdoms, it will owe its birth to the licentiouſneſs of the preſs. At the approach of ſuch a period, when the minds of men are gradually diſordered and unhinged by poiſonous effuſions from the preſs, ſhould the government then ſtrive to ſave the country, ſhould the judges then ſtrive to ſave the laws, by puniſhing the violaters of the liberty of the preſs, and ſhould the juries at that period, as was obſerved in a former page[a], be ſo far infected by the mad contagion, as to exerciſe the power given them of acquitting every offender put on his trial: what will the country then ſay of the policy of the late popular act of 32 *Geo.* III. which took from learned and independent judges, and placed in a jury, the power of determining generally and finally on what is and what is not a libel? General obſervation muſt convince every man that the ſuppoſition of ſuch a period is not a mere matter of poſſibility or idle ſpeculation. Let the people but be deluded into the belief, now ſo induſtriouſly attempted, that their government is oppreſſive, and that their burdens are the conſequences of their government, and the awful period is at hand.

[a] Page 193.

CURIOUS

CURIOUS CUSTOMS OF MANORS.

ONE of the branches of the Laws of *England* is particular cuſtoms, or the laws which affect only the inhabitants of particular diſtricts, and are different from the general laws of the land.

Theſe particular cuſtoms, or ſome of them, are without doubt the remains of that multitude of local cuſtoms out of which the common law, as it now ſtands, was collected at firſt by king *Alfred*, and afterwards by king *Edgar* and *Edward the Confeſſor*: each diſtrict mutually ſacrificing ſome of its own ſpecial uſages, in order that the whole kingdom might enjoy the benefit of one uniform and univerſal ſyſtem of laws. But, for reaſons that have been now long forgotten, particular counties, cities, towns, manors, and lordſhips, were very early indulged with the privilege of abiding by their own cuſtoms, in contradiſtinction to the reſt of the nation at large: which privilege is confirmed to them by ſeveral acts of parliament. Such is the cuſtom of gavelkind in *Kent* and ſome other parts of the kingdom (though, perhaps it was alſo general till the *Norman* conqueſt) which ordains, that not the eldeſt ſon only of the father ſhall ſucceed to his inheritance, but all the ſons alike: and that, though the anceſtor be attainted and hanged, yet the heir ſhall ſucceed to his eſtate, without any eſcheat to the lord.—Such is the cuſtom that prevails in divers ancient boroughs, and therefore called borough-Engliſh, that the youngeſt ſon ſhall inherit the eſtate, in preference to all his elder brothers.—Such is the cuſtom in other boroughs, that a widow ſhall be entitled, for her dower, to all her huſband's lands; whereas at the common law ſhe ſhall be endowed of one third part only; ſuch alſo are the ſpecial and particular cuſtoms of manors, of which every one has more or leſs, and which bind all the copyhold and cuſtomary tenants that hold of the ſaid manors; ſuch likewiſe is the cuſtom of holding divers inferior courts, with power of trying cauſes, in cities and trading towns; the right of holding which, when no royal grant can be ſhewn, depends intirely upon immemorial and eſtabliſhed uſage; ſuch, laſtly, are many particular cuſtoms within the city of *London*, with regard to trade, apprentices, widows, orphans, and a variety of other matters. All theſe are contrary to the general law of the land, and are good only by

ſpecial

ſpecial uſage; though the cuſtoms of *London* are alſo confirmed by act of parliament. 1 *Black. Comm.* 74.

Of theſe cuſtoms we will ſelect ſome of the moſt curious.

ROCHFORD.——County of ESSEX.

On *King's-Hill* in *Rochford*, in the county of *Eſſex*, on every Wedneſday morning next after Michaelmas day at cock's crowing, there is by antient cuſtom a court held by the lord of the honour of *Raleigh*, which is vulgarly called the Lawleſs-Court. The ſteward and ſuitors whiſper to each other, and have no candles, nor any pen and ink, but ſupply that office with a coal; and he that owes ſuit or ſervice thereto, and appears not, forfeits to the lord double his rent, every hour he is abſent. The court is called lawleſs, becauſe held at an unlawful or lawleſs hour, or *quia dicta ſine lege*. The title of it in the Court Rolls runs thus.

KING'S HILL, in ROCHFORD. } *ff.* {

Curia de Domino Rege,
Dicta ſine Lege,
Tenenta eſt ibidem
Per ejuſdem Conſuetudinem;
Ante ortum Solis,
Luceat niſi Polus,
Nil ſcribit niſi Colis.
Totius voluerit,
Gallus ut Cantaverit;
Per cujus ſolum Sonitum
Curia es ſummonita.
Clamat elam pro Rege,
In Curia ſine Lege,
Et niſi cito venerint
Citius pænituerint;
Et niſi elam accedant
Curia non attendat;
Qui venerit cum Lumine
Errat in Regimine,
Et dum ſunt ſine Lumine
Capti ſunt in Crimine;
Curia ſine Cura
Jurati de Injuria,

Tenta ibidem Die Mercurii (ante Diem) proximi (r. proxime or proximo) poſt Feſtum Sancti Michaelis *Archangeli, Anno Regni Regis, &c.*

This

This Lawleſs Court is imperfectly mentioned by *Camden* in his deſcription of *Eſſex*; who ſays, this ſervile attendance was impoſed on the tenants of that manor, for conſpiring, at the like unſeaſonable time, to raiſe a commotion.

KIDLINGTON.——County of OXFORD.

At *Kidlington* in *Oxfordſhire*, the cuſtom is, that on *Monday* after *Whitſon-Week*, there is a fat live lamb provided, and the maids of the town, having their thumbs tied behind them, run after it, and ſhe that with her mouth takes and holds the lamb, is declared *lady of the lamb*, which being dreſſed, with the ſkin hanging on, is carried on a long pole before the lady and her companions to the green, attended with muſic, and a moriſco dance of men, and another of women, where the reſt of the day is ſpent in dancing, mirth and merry glee. The next day the lamb is part baked, boiled, and roaſt, for the lady's feaſt, where ſhe ſits majeſtically, at the upper end of the table, and her companions with her, with muſic and other attendants, which ends the ſolemnity.

MONTGOMERY.——The Town of.

Whereas through *ſcolds* and *whores* many evils ariſe in the town, viz. Strifes, fightings, defamations, &c. and many other diſturbances by their ſhouting and bawling, our practice concerning them, is, that when they are taken they are adjudged to the *goging ſtoole* [a], and there to ſtand with their feet naked, and their hair hanging and diſhevelled, for ſuch time as they may be ſeen by all perſons paſſing that way, according to the will of our chief bailiffs.

COLESHILL.——County of WARWICK.

They have an antient cuſtom at *Coleſhill*, in the county of *Warwick*, that if the young men of the town can catch a *hare*, and bring it to the parſon of the pariſh, before ten of the clock on *Eaſter-Monday* the parſon is bound to give them a *calve's head* and a *hundred of eggs* for their breakfaſt, and a groat in money.

WARHAM.——County of DORSET.

By the cuſtom of *Warham*, in the county of *Dorſet*, both males and females have a right, equally, in the partition

[a] The ſame as *cucking-ſtool*, which is an engine invented for the puniſhment of ſcolds, by ducking them in the water. Lamb. Eiren. b. 1, c. 12.

tition of lands and tenements; *Tenementa in Warham ſunt partabilia inter Maſculos et Fœminas*, ſays the record. And is ſo unuſual a cuſtom, that perhaps it may be hard to find the like elſewhere in *England*.

DUNMOW.——County of ESSEX.

Robert Fitzwalter, living long beloved of king *Henry*, ſon of king *John*, as alſo of all the realme, betook himſelf in his latter dayes to prayer and deeds of charity, gave great and bountifull alms to the poor, kept great hoſpitality, and re-edified the decayed priſon (priory) of *Dunmow*, which one *Juga* (*Baynard*) a moſt devout and religious woman, being in her kinde his anceſtor, had builded; in which priſon (priory) aroſe a cuſtome, begun and inſtituted, eyther by him, or ſome other of his ſucceſſours, which is verified by a common proverbe or ſaying, viz. *That he which repents him not of his marriage, either ſleeping or waking, in a year and a day, may lawfully go to Dunmow and fetch a gammon of bacon.* It is moſt aſſured that ſuch a cuſtome there was, and that this *bacon* was delivered with ſuch ſolemnity and triumphs as they of the priory and the townſmen could make. I have enquired of the manner of it, and can learne no more but that it continued untill the diſſolution of that houſe, as alſo the abbies. And that the party or pilgrim for *bacon* was to take his oath before prior and convent, and the whole town, humbly kneeling in the church-yard upon two hard pointed ſtones, which ſtones ſome ſay are there yet to be ſeen in the prior's church-yard; his oath was miniſtered with ſuch long proceſs, and ſuch ſolemne ſinging over him, that doubtleſs muſt make his pilgrimage (as I may terme it) painfull: after, he was taken up upon men's ſhoulders, and carried, firſt about the priory church-yard, and after, through the town with all the fryers and brethren, and all the town's-folke, young and old, following him with ſhouts and acclamations, with his *bacon* borne before him, and in ſuch manner (as I have heard) was ſent home with his *bacon*; of which I find that ſome had a gammon, and others a flecke, or a flitch; for proof whereof I have from the records of the houſe, found the names of three ſeveral perſons that at ſeveral times had it.

Anno 23 *Henry* VI. (1445.) memorandum, that one *Richard Wright* of *Badbury*, near the city of *Norwich* in the county of *Norfolk*, labourer (*Plebeius*) came to *Dunmow* and required the *bacon*, to wit, on the 27th of *April*, in the 23d year of the reign of king *Henry* VI. and according to the form of the charter was ſworn before *John Cannon*, prior

prior of the place and the convent, and very many other neighbours, and there was delivered to him the ſaid *Richard* a ſide or flitch of *bacon*.

Anno 7 *Edw.* IV. (1467.) memorandum, that one *Stephen Samuel* of *Ayſton-Parva*, in the county of *Eſſex*, huſbandman, on the day of the Bleſſed Virgin in *Lent* (25th *March*) in the 7th year of king *Edward* IV. came to the priory of *Dunmow*, and required a *gammon of bacon*; and he was ſworn before *Roger Bulcott*, then prior of the place and the convent, and alſo before a multitude of other neighbours, and there was delivered to him a *gammon of bacon*.

Anno 2 *Hen.* VIII. memorandum, that in the year of our lord 1510, *Thomas le Fuller* of *Cogſhall*, in the county of *Eſſex*, came to the priory of *Dunmow*, and on the 8th day of *September*, being *Sunday*, in the 2d year of king *Henry* VIII. according to the form of the charter, was ſworn before *John Tils*, then Prior of the houſe and the convent, and alſo before a multitude of neighbours, and there was delivered to him, the ſaid *Thomas*, a *gamon of bacon*.

Hereby it appeareth, that it was according to a charter, or donation, given by ſome conceited benefactor to the houſe; and it is not to be doubted, but that at ſuch a time, the bordering towns and villages reſorted, and were partakers of their paſtimes, and laught to ſcorne the poore man's paynes.

The form of the oath taken by thoſe at Dunmow, who are to have the Bacon.

You ſhall ſwear by cuſtom of confeſſion,
If ever you made nuptial tranſgreſſion.
Be you either married man or wife.
If you have brawls or contentious ſtrife;
Or otherwiſe at bed or at board,
Offended each other in deed or word:
Or ſince the pariſh clerk ſaid Amen,
Yo wiſhed yourſelves unmarried agen,
Or in a twelve-moneth and a day
Repented not in thought any way;
But continued true in thought and deſire,
As when you joined hands in the quire.
If to theſe conditions, without all feare,
Of your own accord you will freely ſweare,
A whole *gammon of bacon* you ſhall receive,
And bear it hence with love and good leave:
For this is our cuſtom at Dunmow well knowne,
Though the pleaſure be ours, the *bacon's* your own.

CHESTER.

CHESTER.——City and County.

Randall Blundeville, earl of *Cheſter*, towards the latter end of the reign of king *Richard* I. being ſuddenly beſieged by the *Welſh* in the caſtle of *Ruthelent* in *Flintſhire*, ſent to his conſtable of *Cheſhire*, one *Roger Lacy* (for his fierceneſs ſurnamed Hell) to haſten with what force he could to his relief.

It happened to be on Midſummer-Day, and a great fair then held at *Cheſter*; whereupon *Roger* immediately got together a great lawleſs mob of fidlers, players, coblers, and the like, and marched inſtantly towards the earl; and the *Welch* perceiving a great multitude approaching, raiſed the ſiege and fled.

The earl being thus freed, comes back with his conſtable to *Cheſter*; and in memory of this ſervice, by a charter grants to *Roger Lacy* and his heirs, power over all the fidlers, letchers, whores, and coblers in *Cheſter*.

About the latter end of the reign of king *John*, or beginning of king *Henry* III. *Roger Lacy*, being dead, his ſon, *John Lacy*, by the following deed, granted to one *Hugh Dutton* his ſteward, and to his heirs, the rule and authority over all the letchers and whores in the county, viz.

"Know all men preſent and to come, that I *John*, conſtable of *Cheſter*, have given and granted, and by this my preſent charter have confirmed to *Hugh de Dutton* and his heirs, the government of all the letchers and whores of all *Cheſhire*, as freely as I hold that government of the earl, ſaving my right to my heirs.

Though the original grant makes no mention of giving rule over fidlers and minſtrels, yet antient cuſtom has now reduced it only to the minſtrelſey; for probably, the rout, which the conſtable brought to the reſcue of the earl, were debauched perſons drinking with their ſweethearts at the fair, the fidlers that attended them, and ſuch looſe perſons as he could get.

In the 14th *Henry* VII. a Quo Warranto was brought againſt *Lawrence Dutton* of *Dutton*, eſquire, to ſhew why he claimed all the minſtrels of *Cheſhire* and the city of *Cheſter* to appear before him or his ſteward at *Cheſter*, yearly, on the feaſt of *St. John Baptiſt*, and to give him at the ſaid feaſt four flaggons of wine and a lance, and alſo every minſtrel then to pay him fourpence halfpenny, and why he claimed from every whore in *Cheſhire*, and the city of *Cheſter*, exerciſing her trade, fourpence, to be paid yearly at the feaſt aforeſaid. To which he pleaded preſcription.

In

In the ſtatutes of the 14th *Eliz.* cap. 5. and the 39th *Eliz.* cap. 4. the firſt intitled, "An act for the puniſhment of vagabonds, and for the relief of the poor and impotent;" and the latter intitled, "An act for puniſhment of rogues, vagabonds, and ſturdy beggars," both now repealed, are inſerted the following proviſo, viz.

"Provided always, that this act or any thing therein contained or any authority thereby given, ſhall not in any wiſe extend to diſinherit, prejudice, or hinder *John Dutton* of *Dutton*, in the county of *Cheſter*, Eſquire, his heirs or aſſigns for, touching or concerning any liberty, pre-eminence, authority, juriſdiction, or inheritance, which the ſaid *John Dutton* now lawfully uſeth, or hath, or lawfully may, or ought to uſe within the county palatine of *Cheſter*, and the county of the city of *Cheſter*, or either of them, by reaſon of any ancient charters of any kings of this land, or by reaſon of any preſcription, uſage, or title whatſoever."

In the 43d *Eliz.* cap. 9. which continued the ſaid act of the 39th *Eliz.* the above clauſe was continued only for one year, except before the end of the ſaid year, the ſaid *John Dutton*, or his heirs, ſhould procure the Lords Chief Juſtices and Lord Chief Baron, or two of them, on hearing his allegations and proofs, to make certificate into the chancery, to be there enrolled, that the ſaid *John Dutton*, or his heirs, ought lawfully (if no ſtatute againſt rogues and beggars had been made) by charter, tenure, or preſcription, to have ſuch liberty of licenſing of minſtrels as he claimed and uſed.

In the ſtatute of the 1ſt *Jac.* I. cap. 25. the ſame clauſe was continued without limitation; ſo that it is probable ſuch proof had then been made as is above-mentioned.

And in the act of the 13th *Geo.* II. cap. 5. commonly called the *Vagrant Act*, a like proviſo is inſerted in favour of the heirs or aſſigns of *John Dutton* of *Dutton*, Eſq. So that the right has now been eſtabliſhed, by act of parliament (ever ſince the year 1572) above 200 years.

The heirs of the ſaid *Hugh Dutton* enjoy the ſame power and authority over the minſtrelſy of *Cheſhire*, even to this day, and keep a court every year upon the feaſt of St. *John Baptiſt* at *Cheſter*, being the fair-day, where all the minſtrels of the county and city do attend and play before the lord of *Dutton* upon their ſeveral inſtruments: he or his deputy then riding through the city, thus attended, to the church of St. *John Baptiſt*, many gentlemen of the county accompanying him, and one walking before him in a ſurcoat of his arms, depicted upon taffata; and after divine ſervice ended,

ended, holds his court in the city, where he or his ſteward renews the old licences granted to the minſtrels, and gives ſuch new ones as he thinks fit, under the hand and ſeal of himſelf or his ſteward, not preſuming to exerciſe that faculty there, without it. But now [a] this dominion or privilege is by a daughter and heir of *Thomas Dutton*, devolved to the Lord *Gerard*, of *Gerard-Bromley*, in *Staffordſhire*.

TUTBURY.—County of STAFFORD.

Upon the morrow after the Aſſumption of the bleſſed Virgin, being the 26th (16th) of *Auguſt*, all the muſicians within the *Honour* are to repair to the bailiff's houſe in *Tutbury*, where the ſteward of the Court [b] (who is uſually a nobleman) and the wood-maſter or his lieutenant are to meet them, from whence they go to the church in this order; firſt, two wind muſicians, as trumpets or long pipes; then four ſtring muſicians, two and two, all playing; then the ſteward of the Court, or his deputy, and the bailiff of the manor, deputed by the Duke of *Devonſhire*, the *king of muſic* going between them: after whom the four ſtewards of muſic, each with a white wand in his hand, and the reſt of the company follow in order.

At the church, the vicar of *Tutbury* for the time being, reads the ſervice of the day, for which every muſician pays him a penny; then all go from the church to the caſtle, in manner as before, where the ſteward takes his place upon the bench in court, aſſiſted with the bailiff and wood-maſter, the king of muſic ſitting between them to ſee that every minſtrel within the *Honour*, being called, and making default, be preſented and amerced by the jury, which amerciaments are collected by the ſtewards of muſic, who account the one moiety to his majeſty's auditor, the other they retain themſelves, for their gains in collecting them. When the king, ſteward, and the reſt are ſo ſate, the ſteward commands an *oyez* to be made three times by one of the muſicians, as cryer of the court, that all minſtrels within the *Honour*, reſiding in the counties of *Stafford*, *Derby*, *Nottingham*, *Leiceſter*, or *Warwick*, do appear to do their ſuit and ſervice, on ſuch pain and peril as the court ſhall inflict for their

[a] So ſaid by Mr. *Blount*. Anno 1679.

[b] The ſteward in Mr. *Blount*'s time was the duke of *Ormond*, and Mr. *Edward Foden* his deputy. The earl of *Devon* was then prior. *Blount* 171. At preſent his grace the duke of *Devonſhire* is the owner of it.

their default; *eſſoigns* nevertheleſs are allowed, in excuſe of defaulters, upon good reaſon ſhewed.

After which all the ſaid minſtrels are called by a ſuit-roll, as ſuitors are in a court-leet, and then two juries are impannelled of the chief minſtrels, by the ſtewards of muſic, each jury conſiſting of twelve, which are returned into the court, where the ſteward ſwears them; the form of their oath is the ſame which is given in a court-leet, only in a leet the jury ſwear to keep the king's counſel, their fellows and their own, in this to keep the king of muſic's counſel, their fellows and their own.

The better to inform their jurors of their duty, the ſteward gives them a charge, in commendation of the ancient ſcience of muſic, ſhewing what admirable effects it has produced, what kings and noble perſons have been profeſſors of it, what manner of perſons the profeſſors ought to be, and to admoniſh them to chuſe ſkilful and good men to be officers for the year enſuing. The officers choſen by the juries are one king and three ſtewards of muſic, the fourth is choſen by the ſteward of the court. The king is choſen one year out of the minſtrels of *Staffordſhire*, and the next year out of thoſe of *Derbyſhire*.

The ſteward of the court iſſues out warrants to the ſtewards of muſic in their ſeveral diſtricts, by virtue whereof they are to diſtrain and levy in any city, town corporate, or other place within the *Honour*, all ſuch fines and amerciaments as are impoſed by the juries on any minſtrel for offences committed againſt the dignity and honour of the profeſſion; the one moiety of which fines the ſtewards account for at the next audit, the other they retain themſelves.

As ſoon as the charge is given, an *oyez* is made, with a proclamation, that if any perſon can inform the court of any offence committed by any minſtrel within the ſaid *Honour*, ſince the laſt court, which is againſt the honour of his profeſſion, let them come forth and they ſhall be heard. Then the juries withdraw to conſider of the points of the charge, and the old ſtewards of muſic bring into the court a treat of wine, ale and cakes, and at the ſame time ſome minſtrels are appointed to entertain the company in court with ſome merry airs. After which the juries preſent one to be king for the year enſuing, who takes his oath to keep up all the dignities of that noble ſcience, &c. Then the old king ariſeth from his place, reſigning it and his white wand to the new king, to whom he alſo drinks a glaſs of wine, and bids him joy of his honour: and the old ſtewards

do

do the like to the new; which done, the court adjourns to a certain hour after noon, and all return back in the ſame order they came to the caſtle, to a place where the old king, at his own coſt, prepares a dinner for the new king, ſteward of the court, bailiff, ſtewards of muſic, and the jurymen.

After dinner all the minſtrels repair to the *Priory-Gate* in *Tutbury*, without any manner of weapons, attending the turning out of the *bull*, which the bailiff of the manor is obliged to provide, and is there to have the tips of his horns ſawed off, his ears and tail cut off, his body ſmeared all over with ſoap, and his noſe blown full of beaten pepper. Then the ſteward cauſes proclamation to be made, that all manner of perſons, except minſtrels, ſhall give way to the bull, and not come within forty foot of him, at their own peril, nor hinder the minſtrels in their purſuit of him. After which proclamation the prior's bailiff turns out the bull among the minſtrels, and if any of them can cut off a piece of his ſkin, before he runs into *Derbyſhire*, then he is the king of muſic's bull; but if the bull gets into *Derbyſhire*, ſound and uncut, he is the lord prior's again.

If the bull be taken and a piece of him cut off, then he is brought to the bailiff's houſe, and there collared and roped, and ſo brought to the bull-ring in the *High-Street* in *Tutbury*, and there baited with dogs; the firſt courſe in honour of the king of muſic, the ſecond in honour of the prior, the third for the town, and if more for the diverſion of the ſpectators; and after he is baited, the king may diſpoſe of him as he pleaſes.

This uſage is of late perverted, the young men of *Stafford* and *Derby ſhires*, contend with cudgels about a yard long, the one party to drive the bull into *Derbyſhire*, the other to keep him in *Staffordſhire*, in which conteſt many heads are often broken.

(The king of muſic and the bailiff have alſo of late compounded, the bailiff giving the king five nobles (*1l.* 13*s.* 4*d.*) in lieu of his right to the bull, and then ſends him to the duke of *Devonſhire*'s manor of *Hardwick*, to be fed and given to the poor at *Chriſtmas*.

N. B. The minſtrel's court, bull running, &c. at *Tutbury*, were entirely abolithed by the duke of *Devonſhire* in the year 1778, at the requeſt of the inhabitants of that village, owing to the outrages uſually committed on thoſe occaſions.

HUTTON-CONYERS.——County of YORK.

Near this town, which lies a few miles from *Ripon*, there is

is a large common, called *Hutton Conyer's Moor*, whereof *William Aiſlabie*, Eſq; of *Studley-Royal* (lord of the manor of *Hutton Conyers*) is lord of the ſoil, and on which there is a large *coney-warren* belonging to the lord. The occupiers of meſſuages and cottages within the ſeveral towns of *Hutton-Conyers*, *Melmerby*, *Balderſby*, *Rainton*, *Diſhforth*, and *Hewick*, have right of eſtray for their ſheep to certain limited boundaries on the common, and each townſhip has a ſhepherd.

The lord's ſhepherd has a pre-eminence of tending his ſheep on any part of the common, and wherever he herds the lord's ſheep, the ſeveral other ſhepherds are to give way to him, and give up their *hoofing-place*, ſo long as he pleaſes to depaſture the lord's ſheep thereon. The lord holds his court the firſt day in the year, to intitle thoſe ſeveral townſhips to ſuch right of eſtray, the ſhepherd of each townſhip attends the court, and does fealty by bringing to the court a large *apple-pye*, and a two-penny *ſweet-cake* (except the ſhepherd of *Hewick*, who compounds by paying ſixteen pence for *ale*, which is drunk as after-mentioned) and a *wooden-ſpoon*; each pye is cut in two, and divided by the bailiff, one half between the ſteward, bailiff, and the tenant of the *Coney-Warren* before-mentioned, and the other half into ſix parts, and divided amongſt the ſix ſhepherds of the above-mentioned ſix townſhips. In the pye, brought by the ſhepherd of *Rainton*, an inner one is made filled with *prunes*.—The cakes are divided in the ſame manner.—The bailiff of the manor provides *furmety* and *muſtard*, and delivers to each ſhepherd a ſlice of *cheeſe* and a penny *roll*. The *furmety*, well mixed with *muſtard*, is put into an earthen pot, and placed in a hole in the ground, in a *garth* belonging to the bailiff's houſe, to which place the ſteward of the court, with the bailiff, tenant of the warren and ſix ſhepherds, adjourn, with their reſpective *wooden-ſpoons*.—The bailiff provides ſpoons for the ſteward, the tenant of the warren, and himſelf.—The ſteward firſt pays reſpect to the *furmety*, by taking a large ſpoonful, the bailiff has the next honour, the tenant of the warren next, then the ſhepherd of *Hutton-Conyers*, and afterwards the other ſhepherds by regular turns; then each perſon is ſerved with a glaſs of *ale* (paid for by the ſixteen pence brought by the *Hewick* ſhepherd) and the health of the lord of the manor is drunk; then they adjourn back to the bailiff's houſe, and the further buſineſs of the court is proceeded in.

Each pye contains about a peck of flower, is about ſixteen or eighteen inches diameter, and as large as will go into

into the mouth of an ordinary oven. The bailiff of the manor meaſures them with a rule, and takes the diameter, and if they are not of a ſufficient capacity, he threatens to return them, and fine the town. If they are large enough, he divides them with a rule and compaſſes into four equal parts, of which the ſteward claims one, the warrener another, and the remainder is divided amongſt the ſhepherds. In reſpect to the *furmety*, the top of the diſh in which it is put, is placed level with the ſurface of the ground, all perſons preſent are invited to eat of it, and thoſe who do not, are not deemed loyal to the lord.—Every ſhepherd is obliged to eat of it, and for that purpoſe, is to take a ſpoon in his pocket to the court, for if any of them neglects to carry his ſpoon with him, he is to lay him down upon his belly, and ſup the *furmety* with his face to the pot or diſh, at which time it is uſual by way of ſport, for ſome of the by-ſtanders to dip his face into the *furmety*; and ſometimes a ſhepherd, for the ſake of diverſion, will purpoſely leave his ſpoon at home. *Beckwith's Edition of Blount's Fragmenta Antiquitatis.*

DEAD BODIES.

Of diſintering them for the purpoſe of Diſſection.

NO *Theft*, or as the law calls it, *Larceny*, can be committed unleſs there be ſome *property* in the thing taken, and an owner; yet if the owner be unknown, provided there be a property, it is larceny to ſteal it, and a perſon may be indicted for ſtealing the goods of a perſon unknown. If any perſon in taking up a dead body ſteals the ſhroud, or other apparel, it will be larceny, for the property thereof remains in the executor, or whoever was at the charge of the funeral; but ſtealing the corpſe itſelf, which has no owner, (though a matter of great indecency) is no larceny; neither can the repreſentatives of perſons deceaſed bring any civil action againſt ſuch as violate and diſturb their remains when dead and buried. The parſon, indeed, who has the freehold of the ſoil, may bring an action of treſpaſs againſt ſuch as dig and diſturb it. In the following caſe it became a queſtion how far taking up

up dead bodies for the purpoſe of diſſection, is a public offence and puniſhable by indictment.

MR. LYNN, the defendant, was proſecuted for entering a burying ground, and taking a coffin out of the earth from which he took a dead body, and carried it away for the purpoſe of diſſecting it. The jury found him Guilty.

Serj. Bond now moved in arreſt of judgment on the ground that the offence was not cognizable in any court of criminal juriſdiction: if it be any crime, it is of eccleſiaſtical cognizance. The crime imputed to the defendant is not made penal by any ſtatute: the only act of parliament, which has any relation to this ſubject, is that of 1 *Jac.* I. c. 12.[a] which makes it felony to ſteal dead bodies for the purpoſes of witchcraft; but that clearly cannot affect the preſent queſtion. And the ſilence of *Hale*, *Hawkins*, and *Stamford*, upon this ſubject, is a very ſtrong argument to ſhew that there is not any ſuch offence cognizable in criminal courts. In 3 *Inſt.* 203, Lord *Coke* ſays, "It is to be obſerved that in every ſepulchre, that hath a monument, two things are to be conſidered, viz. the monument, and the ſepulture or burial of the dead, the burial of the *cadaver* is NULLIUS IN BONIS and belongs to eccleſiaſtical cognizance; but as to the monument, action is given at the common law for defacing thereof." So that it was alſo the opinion of Lord *Coke* that the preſent charge is not the ſubject of an indictment in a criminal court. There is an inſtance in 3 *Inſt.* 45, of a perſon being taken with a head and face of a dead man with a book of ſorcery, and was brought into the *King's-Bench*, but no indictment was preferred againſt him: and the only crime imputed to him was that of being a ſorcerer, and all the writers on this ſubject have conſidered the injury which is done to the executors of the deceaſed by taking the ſhroud, and the treſpaſs in digging the ſoil; taking it for granted that the act of carrying away a dead body was not criminal.

Garrow, who was to ſupport this motion, mentioned that, perhaps, the circumſtance ſtated in this indictment of the defendant's taking the body *for the purpoſe of diſſection* might differ this from the common caſe of taking up dead bodies for any indecent exhibitions. And, on the Court aſking whether this queſtion had not been conſidered in the caſe of one *Young* a few years ago, he obſerved that this caſe was

[a] This Statute is repealed by 9 *Geo.* II. c. 5.

very diſtinguiſhable from that, for there a maſter of *Shoreditch* working-houſe, a ſurgeon, and another perſon were indicted for a *conſpiracy to prevent the burial of a perſon* who died in the workhouſe. But the court ſaid that common decency required that the practice ſhould be put a ſtop to. That the offence was cognizable in a criminal court, as being indecent and *contra bonos mores*; at the bare idea alone of which nature revolted. That the purpoſe of taking up the body for diſſection, did not make it leſs an indictable offence. And that as it had been the regular practice at the *Old-Bailey* in modern times to try charges of this nature, many of which had induced puniſhment, the circumſtance of no writ of error having been brought to reverſe any of theſe judgments was a ſtrong proof of the univerſal opinion of the profeſſion upon the ſubject. They therefore refuſed even to grant a rule to ſhew cauſe why judgment ſhould not be arreſted, leſt that alone ſhould convey to the public, an idea that they entertained a doubt reſpecting the crime alledged. But inaſmuch as this defendant might have committed the crime merely from ignorance, no perſon having been before puniſhed in this court for this offence, they only fined him five marks. *The King againſt Lynn*, 2 *Durnford and Eaſt's Reports*, 733. 24 *Nov.* 1788.

FANATICISM.

Of procuring the Conveyance of Property by Means of Fanaticiſm, or religious Frenzy.

IT has been obſerved (ante pag. 109) that if a man enter into an agreement and bind himſelf by legal ſolemnities, he is in point of law obliged to perform it, but that if ſuch agreement be procured by impoſition, oppreſſion, or other undue means, a court of equity will relieve the party from the performance of it. The following is a remarkable caſe of relief afforded, in a caſe of impoſition by means of fanaticiſm.

REILLY, a methodiſt preacher, by fraud, impoſition, miſrepreſentation, and various circumſtances of fanatical deluſion, prevailed on Mrs. *Norton*, a ſingle lady, to advance him ſeveral ſums of money at divers times, and to execute a deed, granting to him an annuity of 50l. a year ſecured

ſecured on her real eſtates; for which at law ſhe was liable; ſhe therefore applied to the chancery for relief by a bill praying that the deed might be cancelled, that *Reilly* might be reſtrained from recovering at law the arrears of the annuity, and alſo that he ſhould refund ſuch monies as he had obtained from her under the circumſtances above-mentioned. After this cauſe had been heard, the lord chancellor *Northington* delivered the following remarkable decree.

This cauſe, as it has been very juſtly obſerved, is the firſt of the kind that ever came before this Court; and I may add, before any Court of judicature in this kingdom. Matters of religion are happily very rarely matters of diſpute in the Courts of law or equity. In regard to Proteſtant diſſenters, under which denomination it has been attempted to ſhelter and include the defendant *Reilly*, no man whatever has a greater regard and eſteem for thoſe who really are ſo, than I bear; and God forbid that in the preſent age the true diſſenters of every kind ſhould not be tolerated, or that the ſpirit of chriſtianity ſhould in this kingdom loſe the ſpirit of moderation. I can and do eſteem the profeſſors of one equally with thoſe of our own eſtabliſhed church, to which not only from the profeſſion of my faith, but from my principles, I bear an higher veneration: but very wide is the difference between diſſenters and fanatics, whoſe canting and whoſe doctrines have no other tendency than to plunge their deluded votaries into the very abyſs of bigotry, deſpair, and enthuſiaſm: and though even againſt thoſe unhappy and falſe paſtors I would not wiſh the ſpirit of perſecution ſhould go forth, yet, are not theſe men to be diſcountenanced and diſcouraged whenever they properly come before the Courts of juſtice? men who go about in the Apoſtles' language, creeping into people's dwellings, deluding weak women? men who go about and diffuſe their rant and warm enthuſiaſtic notions, to the deſtruction not only of the temporal concerns of many of his majeſty's ſubjects, but to the endangering their eternal welfare? And ſhall it be ſaid that this Court ſhall not relieve againſt the glaring impoſitions of theſe men? not relieve the weak and unwary, even though their impoſitions are exerciſed on thoſe of the weaker ſex? It is by no means arguing agreeably to the practice and equity of this Court to inſiſt on it: this Court is the guardian and protector of the weak and helpleſs of every denomination, and the puniſher of fraud and impoſition in every degree; yes, this Court can extend its hands of protection; it has a conſcience to relieve, and the conſtitution itſelf would be in danger if it did not. To come to the

preſent caſe: here is a man, nobody knows who or what he is; his own counſel have taken much pains, modeſtly, to tell me what *he is not*; and depoſitions have been read to ſhew that he is not *a Methodiſt*. What is that to me? But I could eaſily have told them what, from the proofs in this cauſe, and his own letters, he appears to be—a ſubtle ſectary, who preys upon his deluded hearers, and *robs* them under the *maſk* of religion; an itinerant, who propagates his fanaticiſm even in the cold northern counties, where one would ſcarce ſuppoſe it ſhould enter. Shall it be ſaid in his excuſe, that, as to this lady, ſhe was as great an enthuſiaſt as himſelf when he firſt became acquainted with her, and conſequently not *deluded* by him? It appears, indeed, that ſhe wrote ſome verſes "On the myſtery of the Union of the Father, Son, and Holy Spirit." 'Tis true, by this, ſhe was far gone, but not gone far enough for his purpoſe, as we ſhall find by his own letters: in one he ſays, "Your former paſtor has excommunicated you; but let not theſe things diſcourage you, but put yourſelf in my congregation, wherein dwells the fulneſs of God." How ſcandalous, nay, how blaſphemous is this! In another his myſtical expreſſion runs, "You will be there weaned from men, and *learn* to complete the fulneſs of goſpel peace." Thus was ſhe advanced ſtep by ſtep, and imbibed his doctrines, till quite intoxicated, if I may uſe the expreſſion, with his madneſs and enthuſiaſm.

But the very material and moſt eſſential point in law, the conſideration of the deed, ſay the defendant's counſel, is the dedicating the principal part of his time in attending the ſpiritual concerns of this lady, and neglecting his flock, who thereupon deſerted him; the only good thing, in my opinion, that appears in the cauſe. But did he receive no conſideration, no recompence for his ſervice? Let us examine a little. Does he come from *London* in the ordinary way, a ſtage coach? No: he muſt have a poſtchaiſe, and live elegantly on the road at the plantiff's expence; who, it appears, at different times gave to, or paid for him to the amount of 52*l.* 19*s.* in money, beſides preſents of liquor and other things; ſo that his own hot imagination was further heated, we find, by the ſpirit of brandy; for all which favours, in a third letter, his expreſſion is, "I thank you in the name of our Saviour for all kindneſs to me." Thus is the Deity introduced to thank her for her ſervice. But this, I ſuppoſe, like the fulneſs of God, as was obſerved by one of the counſel, is to be taken figuratively. I might, I believe, with more propriety ſay, this 50*l.* a year was figurative and expreſſive of the lady's whole fortune.

tune. We will take a ſhort view how he proceeds to come at it. The lady comes to town by his perſuaſions, where poſſibly ſhe had never been before, goes and lives in *Surry*, as in an inquiſition; for ſhe is put into an houſe environed by an high wall, and no one is to have acceſs to her but her paſtor or the attorney, on the preſent occaſion of preparing the deed in queſtion; whereby the defendant was to ſtep into and ſecure a part of her fortune under the veil of friendſhip, or rather by lighting up in her breaſt the flame of enthuſiaſm: and undoubtedly he hoped in due time to ſecure the whole by kindling another flame of which the female breaſt is ſuſceptible; for the invariable ſtyle of his letters is, "all is to be completed by love and union!" But to return: in this place of inquiſition ſhe is by them tutored to be private in her charity, ſo that her relations who are injured, were to know nothing of her preſent bounty. But would not any man of honour in the profeſſion have told her, "Madam, you are going to do a thing which may embaraſs your circumſtances, and injure your relations; a thing which the law will not ſupport unleſs it is fairly and openly obtained; and therefore, unleſs you will appriſe your friends of it, I will not be concerned." This, I ſay, was incumbent on the attorney to have done; but this was omitted, and it was in ſecret. Yet let it not be told in the ſtreets of *London*, that this preaching ſectary only defended his juſt right, and muſt be ſupported in it. Let them not be perſecuted, I repeat; but many of them deſerveto be repreſented in puppet-ſhows. I have conſidered this cauſe not merely as a private matter, but of public concernment and utility. Bigotry and enthuſiaſm have ſpread their baneful influence amongſt us far and wide, and the unhappy objects of the contagion almoſt daily increaſe: of this not only Bedlam, but moſt of the private mad-houſes, are melancholy ſtriking proofs. I have ſtayed much beyond my time, have given this cauſe a long and patient hearing; and inaſmuch as the deed was obtained on circumſtances of the greateſt fraud, impoſition, and miſrepreſentation, that could be, let it be decreed, that the defendant *Reilly* execute a releaſe to the plantiff, Mrs. *Norton*, of this annuity, and deliver up the deed for ſecuring it; and if any difference ariſe, let the ſame be ſettled by the maſter, who is to take an account of all ſum or ſums of money paid by the plaintiff, Mrs. *Norton*, to the defendant, or to his uſe; for which purpoſe all proper parties are to be examined upon interrogatories, and all which ſums the defendant is hereby decreed to pay, together with the coſts of this ſuit. I cannot

not conclude without obſerving, that one of his counſel, with ſome ingenuity, tried to ſhelter him under the denomination of an independent preacher: I have tried, in the decree I have made, to ſpoil his independency. *Chancery. Norton* and *Reilly. Reg. Lib.* B. 66. 10 *Dec. A. D.* 1764.

PRESSING OF SEAMEN.

Diſcuſſion of its Legality.

THE power of impreſſing ſeafaring men for the ſea ſervice by the king's commiſſion, has been a matter of ſome diſpute, and ſubmitted to with great reluctance; though it hath very clearly and learnedly been ſhewn by Sir *Michael Foſter*, that the practice of impreſſing, and granting power to the admiralty for that purpoſe, is of very ancient date, and hath been uniformly continued by a regular ſeries of precedents to the preſent time: whence he concludes it to be part of the common law. The difficulty ariſes from hence, that no ſtatute has expreſsly declared this power to be in the crown, though many of them very ſtrongly imply it. The ſtatute 2 *Ric.* II. c. 4. ſpeaks of the mariners being arreſted and retained for the king's ſervice, as of a thing well known, and practiſed without diſpute; and provides a remedy againſt their running away. By a latter ſtatute[a], if any waterman, who uſes the *River Thames*, ſhall hide himſelf during the execution of any commiſſion of preſſing for the king's ſervice, he is liable to heavy penalties. By another[b], no fiſherman ſhall be taken by the queen's commiſſion to ſerve as a mariner; but the commiſſion ſhall be firſt brought to two juſtices of the peace, inhabiting near the ſea coaſt where the mariners are to be taken, to the intent that the juſtices may chuſe out and return ſuch a number of able-bodied men, as in the commiſſion are contained, to ſerve her majeſty. And by others, eſpecial protections are allowed to ſeamen, in particular circumſtances, to prevent them from being impreſſed. And ferrymen are alſo ſaid to be privileged from being impreſſed, at common law. All which do moſt evidently imply a power of impreſs to reſide ſomewhere, and, if any where, it muſt from the ſpirit of our conſtitution, as well

[a] Stat. 2 and 3 *Ph.* and *M.* c. 16. [b] Stat. 5 *Eliz.* c. 5.

well as from the frequent mention of the king's commiſſion, reſide in the crown alone. 1 *Black. Comm.* 419.

The Caſe of Alexander Broadfoot, 30*th* Auguſt 1743. *Court of Goal delivery at* Briſtol.

ALEXANDER BROADFOOT, was indicted for the murder of *Cornelius Calahan*, a ſailor belonging to his majeſty's ſhip the *Mortar Sloop*.

The circumſtances were as follow. Captain *Hamway*, commander of the *Mortar Sloop*, had a warrant from the lords of the admiralty, grounded on an order of his majeſty in council, empowering him to impreſs, or cauſe to be impreſſed, ſeamen for his majeſty's ſervice. The following is a copy of the warrant, with the indorſement.

By the commiſſioners for executing the office of Lord High Admiral of *Great Britain* and *Ireland* &c. and of all his majeſty's plantations, &c.

In purſuance of his majeſty's order in council dated the 19th day of *January* 1742, we do hereby impower and direct you to impreſs or cauſe to be impreſſed, ſo many ſeamen and ſeafaring men and perſons whoſe occupations and calling are to work in veſſels and boats upon rivers, as ſhall be neceſſary not only to complete the number of men allowed to his majeſty's ſhip under your command, but alſo to man ſuch others of his majeſty's ſhips as may be in want of men; giving unto each man ſo impreſſed one ſhilling for preſs money. And in the execution hereof you are to take care that neither yourſelf nor any officer authorized by you do demand or receive any money, gratuity, reward, or other conſideration whatever, for the ſparing, exchanging, or diſcharging any perſon or perſons impreſſed, or to be impreſſed, as you will anſwer it at your peril. *You are not to entruſt any perſon with the execution of this warrant but a commiſſion-officer, and to inſert his name and office in the deputation on the other ſide hereof*, and ſet your hand and ſeal thereto. This warrant to continue in force till the 31ſt day of *December* 1743. And in the due execution of the ſame and every part thereof, all mayors, ſheriffs, juſtices of the peace, bailiffs, conſtables, headboroughs, and all other his majeſty's officers and ſubjects whom it

may concern, are hereby required to be aiding and aſſiſting unto you and thoſe employed by you: as they tender his majeſty's ſervice, and will anſwer the contrary at their perils. Given under our hands and ſeal of the office of admiralty the 31ſt day of *January* 1742.

By command of their Lordſhips,
THOMAS CORBETT.

JO. COCKBURNE,
GEO. LEE.
J. TREVOR."

Indorſement.

I do hereby depute A. B. a Lieutenant belonging to his majeſty's ſhip the *Mortar Sloop* under my command, to impreſs ſeamen, ſeafaring men, and perſons whoſe occupations and callings are to work in veſſels and boats upon rivers according to the tenor of this warrant. In teſtimony whereof I have hereunto ſet my hand and ſeal this day of

It is to be obſerved that the warrant expreſsly directeth, "That the captain ſhall not intruſt any perſon with the execution of it, but a commiſſion-officer; and ſhall inſert the name and office of the perſon intruſted on the back of the warrant." The lieutenant of the *Mortar Sloop*, (the only commiſſion officer on board beſides the captain) was deputed by him, to impreſs according to the tenor of the warrant. On the 25th of *April* laſt, Captan *Hanway* being at anchor in *Kingroad*, within the port and county of *Briſtol*, ordered the ſhip's boat down the channel in order to preſs, as they ſhould ſee opportunity. But the lieutenant ſtaid in *Kingroad*, on board with the captain.

Towards evening the boat came up with a merchantman, the *Bremen Factor*, homeward bound, in that part of the chanel which is within the county of the city of *Briſtol*, but ſome leagues from *Kingroad*, and ſome of the crew went on board, in order to preſs; who being informed that one or two of the *Bremen's* men were concealed in the hold, *Calahan*, with three other of the boats crew, went thither in ſearch of them. Whereupon *Broadfoot*, one of the *Bremen's* men (who had before provided himſelf with a blunderbuſs and piſtols, for his defence againſt the preſs-gang) called out and aſked them what they came for: he was anſwered by ſome of the preſs-gang, "We come for you and your comrades." Whereupon he cried out, "Keep back, I have a blunderbuſs loaded with ſwan-ſhot." Upon this the others ſtopped, but did not retire. He then cried out,

out, "Where is your lieutenant?" And being anſwered, "He is not far off," he immediately fired among them. By the ſhot *Calahan* was killed on the ſpot, and one or two more of the preſs-gang wounded.

The caſe being thus, the recorder (Sir *M. Forſter*) was of opinion, that the boat's crew having been ſent out with a general order to impreſs as they ſhould ſee opportunity, and having, in purſuance of that order, boarded the veſſel *without a proper officer*, expreſsly againſt the captain's warrant, every thing they did was to be looked upon as an attempt upon the liberty of the perſons concerned, without any legal warrant: and he accordingly directed the jury to find *Broadfoot* guilty of manſlaughter only. But this being a caſe of great expectation, and uncommon pains having been taken to poſſeſs people with an opinion; that preſſing for the ſea-ſervice is a violation of *magna charta*, and a very high invaſion of the liberty of the ſubject, the recorder thought proper to deliver his opinion, touching the legality of preſſing for the ſea-ſervice; provided the perſons impreſſed are proper objects of the law, and thoſe employed in that ſervice come armed with a proper warrant for that purpoſe.

The Recorder's Argument.

THIS queſtion touching the legality of preſſing mariners for the public ſervice is a point of very great national importance. On one hand, a very uſeful body of men ſeem to be put under hardſhips inconſiſtent with the temper and genius of a free government. On the other, the neceſſity of the caſe ſeemeth to intitle the public to the ſervice of this body of men, whenever the ſafety of the whole calleth for it.

Before I ſpeak directly to the point, it will be neceſſary to throw out of the caſe every thing which doth not enter into the merits of the preſent queſtion.

We are not, at preſent, concerned to inquire, whether perſons may be legally preſſed into the land-ſervice, nor whether land-men may be legally preſſed into the ſea-ſervice. The preſent queſtion, I ſay, is not, whether people may be taken from their lawful occupations at home, and ſent againſt their will into a remote and dangerous ſervice; into a ſervice they are utterly unacquainted with, and poſſibly unfit for. No, the only queſtion at preſent is, whether mariners, perſons who have freely choſen a ſeafaring life, perſons whoſe education and employment have fitted them

them for the ſervice, and inured them to it, whether ſuch perſons may not be legally preſſed into the ſervice of the crown, whenever the public ſafety requireth it, *ne quid detrimenti reſpublica capiat.*

For my part I think they may. I think the crown hath a right to command the ſervice of theſe people, whenever the public ſafety calleth for it. The ſame right that it hath to require the perſonal ſervice[a] of every man able to bear arms in caſe of a ſudden invaſion, or formidable inſurrection. The right in both caſes is founded on one and the ſame principle, the neceſſity of the caſe in order to the preſervation of the whole.

It would be time very ill ſpent to go about to prove that this nation can never be long in a ſtate of ſafety, our coaſt defended and our trade protected, without a naval force equal to all the emergencies which may happen, and how can we be ſure of ſuch a force? The keeping up the ſame naval force in time of peace, which will be abſolutely neceſſary for our ſecurity in time of war, would be an abſurd, a fruitleſs, and a ruinous expence.

The only courſe then left is for the crown to employ upon emergent occaſions the mariners bred up in the merchants ſervice.

By this means the trade of the nation becometh a nurſery for her navy; and the merchant, while he is increaſing the wealth of the kingdom, is at the ſame time training up the mariner for its defence.

And as for the mariner himſelf, he when taken into the ſervice of the crown only changeth maſters for a time: his ſervice and employment continue the very ſame, with this advantage, that the dangers of the ſea and enemy are not ſo great in the ſervice of the crown, as in that of the merchant.

I am very ſenſible of the hardſhip the ſailor ſuffereth from an impreſs in ſome particular caſes, eſpecially if preſſed homeward bound after a long voyage. But the merchants who hear me know, that an impreſs on outward bound veſſels would be attended with much greater inconveniences to the trade of the kingdom; and yet that too is ſometimes neceſſary. But when two evils preſent, a wiſe adminiſtration, if there be room for an option, will chooſe the leaſt.

War

[a] This perſonal ſervice in caſes of extreme neceſſity is a principal branch of the allegiance every ſubject of *England* oweth to the crown. See 11 *Hen.* VIII. c. 1. 1 *Edw.* III. c. 5. and 16 and 17 *Car.* I. c. 28.

War itſelf is a great evil, but it is choſen to avoid a greater. The practice of preſſing is one of the miſchiefs war bringeth with it. But it is a maxim in law, and good policy too, that all private miſchiefs muſt be borne with patience for preventing a national calamity. And as no greater calamity can befal us than to be weak and defenceleſs at ſea in a time of war, ſo I do not know that the wiſdom of the nation hath hitherto found out any method of manning our navy, leſs inconvenient than preſſing; and, at the ſame time, equally ſure and effectual.

The expedient of a voluntary regiſter, which was attempted in king *William*'s time, had no effect.

And ſome late ſchemes I have ſeen appear to me more inconvenient to the mariner, and more inconſiſtent with the principles of liberty, than the practice of preſſing: and what is ſtill worſe, they are in my opinion totally impracticable.

Thus much I thought proper to ſay upon the foot of reaſon and public utility, before I come to ſpeak directly to the point of law, which I ſhall now do.

According to my preſent apprehenſion, (and I have taken ſome pains to inform myſelf) the right of impreſſing mariners for the public ſervice is a prerogative inherent in the crown, *grounded upon common law, and recognized by many acts of parliament.*

A general immemorial uſage not inconſiſtent with any ſtatute, eſpecially if it be the reſult of evident neceſſity, and withal tendeth to the public ſafety, is, I apprehend, part of the common law of *England.* If not, I am at a loſs to know what is meant by common law, in contradiſtinction to ſtatute law, and therefore it is a great miſtake in this caſe, as indeed it would be in any other, to conclude that there is no law, becauſe, perhaps, there may be no ſtatute that expreſsly, and in terms impowereth the crown to preſs. For the rights of the crown, and the liberties of the ſubject too, ſtand principally upon the foot of common law; though both have been in many caſes confirmed, explained, and aſcertained by particular ſtatutes.

As to the point of uſage in the matter of preſſing, I have met with a multitude of commiſſions and mandatory writs to that purpoſe conceived in various forms; and from time to time directed to different affairs, as the nature of the ſervice required.

It would be tedious for me to cite one half of them; but I will endeavour to range them under ſome general heads, and then cite a few.

Some

Some are for preſſing ſhips.

Others for preſſing mariners.

And others for preſſing ſhips and mariners.

In ſome, the parties to whom they are directed, are required to make a general impreſs upon certain great and emergent occaſions.

In others they are confined to a certain number of ſhips and mariners for ſpecial ſervices.

And in others, they are ſtill farther confined to certain places on the coaſt.

Some commiſſions, particularly thoſe conferring the admiralty juriſdiction, and the rights of admiralty, warrant an impreſs as often as there ſhall be occaſion.

Others impower commanders of fleets and ſquadrons, intended for certain expeditions, to preſs for that particular ſervice.

And others impower maſters of particular ſhips to preſs for manning their reſpective veſſels.

This general view will be ſufficient to let us into the nature of theſe precedents. And though the affair of preſſing ſhips is not now before me, yet I could not well avoid mentioning it; becauſe many of the precedents I have met with, and muſt cite, go as well to that, as to the buſineſs of preſſing mariners; and taken together, they ſerve to ſhew the power the crown hath conſtantly exerciſed over the whole naval force of the kingdom, as well ſhipping as mariners, whenever the public required it.

This however muſt be obſerved, that no man ſerved the crown in either caſe at his own expence. Maſters and mariners received full wages, and owners were conſtantly paid a full freight. But whether the pay in either caſe commenced from the time of preſſing, or from the time of actual entry into the ſervice is not ſo clear. There is in *Cotton*'s records a note of a petition of the commons, and of the king's anſwer upon this ſubject, in the 47 *Edw.* III. which inclineth me to think that the lattr was the caſe. The petition, as abridged by *Cotton*, is thus: "That maſters of ſhips may be paid the wages of them and their mariners from the day of their being appointed to ſerve the king." The anſwer is, "The taking of ſhips ſhall not be but for neceſſity, and payment ſhall be reaſonable as *heretofore*."

In the ſame parliament an attempt was made to obtain for owners of ſhips an allowance for wear and tare in the king's ſervice.

The petition is thus abridged, "The maſters of ſhips require an allowance for the tackling of their ſhips worn by the king's ſervice."

The

The anſwer is "Such allowance hath not been heretofore made."

In the 2d *R.* II. an attempt of the like kind was made and with the like ſucceſs. The petition is, "That owners of ſhips taken up for the king's ſervice, for their loſſes in the ſame, may be conſidered; and that mariners may have the like wages, as archers have." The anſwer is, "It ſhall be as it hath been uſed."

Theſe petitions, though ſtiled in the records the petitions of the commons, as having probably begun in that houſe, were really the acts of both houſes; otherwiſe they could not have been offered to the king in a parliamentary way: for the ancient method of paſſing bills was, that the matter of the bill was tendered to the crown for the royal aſſent by both houſes in form of petitions; and according to the anſwers from the throne, they paſſed into laws or were rejected.

I cannot but obſerve, that when we ſee every branch of the legiſlature ſpeaking of the ſubject of preſſing in the manner they do in theſe petitions and anſwers, it is not eaſy to conceive, that the legality of the practice was then queſtioned. It is plain at leaſt, that it was in thoſe early times treated in parliament as an ancient and well known uſage.

I come now to the commiſſions and mandatory writs I ſpake of. I will cite a few from *Rymer's Fœdera*, out of a great number of the like kind which may be met with in that valuable collection of public records.

William Barret, commander of the ſhip *Julian*, had a commiſſion to make choice of and take up in the counties of *Kent*, *Eſſex*, *Surry*, and *Suſſex*, as well within liberties as without, thirty-ſix mariners, and to put them on board his ſhip, in order to proceed with the Prince of *Wales* on an expedition to *Gaſcony*.

The recorder then proceeded to cite a number of other commiſſions which had at different times been granted to impreſs mariners; after which he proceeded,

"And now, when I conſider theſe precedents, not fetched from dark, remote, and unſettled times, but running uniformly through a courſe of many ages, all, as I conceive, ſpeaking to the ſame purpoſe, though in different forms of expreſſion; ſome for making choice of, others, and thoſe the much greater number, and of the lateſt date, for making choice of and taking up, or for arreſting, preſſing and taking up, mariners, and putting them on board for the public ſervice:—When I conſider theſe precedents with the practice down to the preſent

preſent time, I cannot conceive otherwiſe of the point in queſtion, than that the crown hath been always in poſſeſion of the prerogative of preſſing mariners for the public ſervice. Which prerogative hath been carried into execution, as well by virtue of ſpecial commiſſions iſſued as the exigency of affairs required, as by the perſons who from time to time have been intruſted with the whole admiralty juriſdiction.

I come now to the ſtatutes which ſpeak of this matter. And I do admit, that I know of no ſtatute now in force, which directly and in expreſs terms impowereth the crown to preſs mariners into the ſervice: and admitting that the prerogative is grounded on immemorial uſage, I know of no neceſſity for any ſuch ſtatute; for let it be remembered that a prerogative grounded upon general immemorial uſage not inconſiſtent with any ſtatute nor repugnant to the public utility, is as much part of the law of *England* as ſtatute law. You will be pleaſed to carry this obſervation too along with you, that the ſtatutes, which mention preſſing as a practice then ſubſiſting, and not diſallowed, are at leaſt an evidence of the uſage, if they go no farther, I mean if they do not amount to a tacit approbation of it.

For it is hard to conceive, that the legiſlature ſhould frequently mention a practice utterly illegal, and repugnant to the principles of the conſtitution as ſubſiſting without ſome mark of diſapprobation.

The firſt ſtatute I have met with is that of the 2 *R.* II. ſt. 1. c. 4. as follows; and is ſtill in force. "*Item*, Becauſe that divers mariners, after they be *arreſted* and *retained* for the king's ſervice upon the ſea in defence of the realm, and thereof have received their wages, do flee out of the ſaid ſervice without licence of the admirals or their lieutenants. It is ordained and eſtabliſhed, that all thoſe mariners, which from henceforth ſhall do in ſuch manner, ſhall be holden to reſtore to our ſaid ſovereign lord the king the double of that they have taken for their wages, and nevertheleſs ſhall have one year's impriſonment without being delivered by mainpriſe, bail, or by other way."

The act then goeth on to direct how fugitive mariners ſhall be apprehended and dealt with; and concludeth with this clauſe, "And like puniſhment ſhall be made of ſerjeants of arms, maſters of ſhips, and all others that ſhall be attainted before the admiral or his lieutenant aforeſaid, that they have any thing taken of the ſaid mariners for to ſuffer them to go at large out of the ſaid ſervice after that they had been *arreſted* for the ſame ſervice." You will be pleaſed to

to obſerve that the word *arreſt*, twice uſed in this act, is made uſe of in the precedents I cited of the 1ſt and 15th of this very reign, and in moſt of thoſe of later date: it is likewiſe uſed in ten other commiſſions, in the ſame reign touching this very ſervice, all likewiſe directed for execution to ſerjeants at arms, which for brevity's ſake I have omitted. So that if it be aſked, Who are the perſons ſubjected to the penalties of this act? it muſt be anſwered, Mariners arreſted and taken into the ſervice by virtue of commiſſions from the crown in caſe of their deſertion; and ſerjeants of arms, maſters of ſhips, and others executing ſuch commiſſions, who for lucre ſhall ſuffer them to go at large after ſuch arreſts.

Mariners indeed were not ſubject to the penalties of this act, unleſs they had received wages. But might not a mariner ſo arreſted have reaſonably ſaid, I was compelled againſt law into the ſervice, I did my duty while I continued in it, and dearly earned the wages I received; might not a mariner have ſaid this, and much more upon a ſuppoſition of the illegality of an impreſs? Certainly he might. But you ſee mariners, though taken into the ſervice by compulſion are by this act made liable to pecuniary, and corporal puniſhment too, in caſe of deſertion. This doth *more than imply* the legality of ſuch compulſion.

It may poſſibly be objected, that the word *retained* is uſed in the act, and that a retainer implieth a mutual contract for ſome ſervice to be done. It may, when it ſtandeth alone, have received that ſenſe in modern language, but in ſtrict propriety it meaneth nothing more than the taking a perſon into ſome ſervice; and is in truth the act only of the perſon retaining or taking. And therefore when I ſee the word *retained* connected with one which hath no other meaning in the *Engliſh* tongue than what carrieth with it the idea of compulſion, I cannot conceive that the legiſlature, ſpeaking of perſons *arreſted* and *retained* ſhould mean no other than perſons taken into the ſervice with their own conſent.

That there was a practice then ſubſiſting of taking mariners into the ſervice by compulſion cannot be denied: the parliament could not be ignorant of it. Is it poſſible then to imagine, that they could uſe a word which manifeſtly ſignifieth compulſion, and yet mean nothing more than a mutual contract? Beſides, it cannot be conceived, that ſerjeants at arms, who as I before obſerved, were the perſons about that time uſually employed in the ſervice of preſſing, could be expreſsly and by name ſubjected to the penalties

penalties of the act, if no mariners but ſuch as voluntarily entered into the ſervice were comprehended in it.

The next act is that of the 2d and third *Ph.* and *Mar.* c. 16. which layeth a penalty on watermen plying between *Graveſend* and *Windſor*, who, to ſpeak in the language of the act, in the time of preſſing by commiſſion for the ſervice of the crown upon the ſea, do willingly and obſtinately withdraw, hide and convey themſelves into ſecret places and out corners: and after, when ſuch time of preſſing is overpaſſed, return to their employments.

This proviſion, it is true, extendeth only to watermen on the *Thames*, and may be conſidered as one of the many wholeſome regulations thoſe perſons are brought under by this act: and it is mentioned in that light in an act paſſed in the late queen's time. But at the ſame time it ſheweth that commiſſions for preſſing were then in uſe. And in my opinion, it likewiſe ſuppoſeth the legality and utility of ſuch commiſſions, and that theſe people are the objects of them: otherwiſe why are they ſubjected even to the ſlighteſt puniſhment, for abſconding at the time of the execution of thoſe commiſſions?

The acts which come next to be conſidered are ſome made ſince the revolution; a moſt auſpicious period, when the principles of liberty were well underſtood, and moſt glorioufly aſſerted.

Theſe are the 7th and 8th of king *William* II. and III. and the 4th and 5th of the late queen.

The firſt is entitled, "An act for the increaſe and encouragement of ſeamen.

It enacteth, among other things, that licences may be given, by his majeſty, or the lord high admiral, or commiſſioners of admiralty, to any landmen willing to enter into the merchant's ſervice, which ſhall be to them a protection "againſt being impreſſed for the ſpace of two years."

Provided ſuch landmen bring two credible perſons to vouch for them. But if any perſon ſhall vouch for any one as a landman, who ſhall afterwards appear to have been a ſeaman, he ſhall forfeit twenty pounds.

The 2d and 3d *Anne*, c. 6. is entitled, "An act for the increaſe of ſeamen, and better encouragement of navigation and ſecurity of the coal trade." To theſe ends it impowereth pariſh-officers to bind poor boys to ſea in the merchant's ſervice; and enacteth, that boys ſo bound out ſhall not be compelled or *impreſſed* or permitted to enter into the ſervice of the crown at ſea till they attain their age of eighteen,

teen, and that certificates of ſuch binding ſhall be tranſmitted by the collectors of the reſpective ports to the admiralty; and that thereupon ſuch protections ſhall be made for ſuch apprentices without fee or reward.

And, for encouraging other perſons to bind themſelves apprentices to the merchant's ſervice, it farther enacteth, that perſons ſo binding themſelves ſhall not be *compelled* or *impreſſed* into the ſervice of the crown for *three years* from the time of ſuch binding, and that upon certificates of ſuch binding from the collectors of the reſpective ports, the admiralty ſhall grant protections without fee or reward.

And, for encouraging the coal trade, it further enacteth, that during the war there ſhall be allowed to every veſſel employed in that trade, beſides the maſter, mate, and carpenter, one able ſeamen for every one hundred ton of the veſſel, not exceeding three hundred ton, *free from impreſſing*.

The 4th and 5th of the late queen reciteth that clauſe in the act of the 2d and 3d, which exempted voluntary apprentices for three years, and ſaith, "Whereas ſuch exemptions for three years, which was intended for the encouragement of landmen to bind themſelves, hath been *manifeſtly abuſed for the exempting and protecting of ſeamen from the ſervice, to the great hindrance and prejudice of her majeſty's ſea-ſervice*; be it therefore enacted and declared, That no perſon or perſons of the age of eighteen years ſhall have any exemption or protection from her majeſty's ſea-ſervice, who ſhall have been in any ſea-ſervice before the time they bound themſelves, any law or ſtatute to the contrary notwithſtanding." There are other acts to the like purpoſe.

Let us now take a ſhort view of theſe acts. Perſons under certain ſpecial qualifications are exempted from being impreſſed.

To that end, in one caſe, licences are to be granted by his majeſty or from the admiralty, *but under proper cautions to prevent abuſes*.

In other caſes, certificates are to be returned from the chief officers of the ports, and protections thereupon granted without fee or reward.

And in every caſe theſe exemptions, as they are confined to perſons under certain limited qualifications, ſo are they limited too in point of time, *and withal given by way of encouragement*. And laſtly, the extending the benefit even of a temporary exemption beyond the original intent of the legiſlature, is declared to be an abuſe, and an abuſe

tending to the great hindrance, and prejudice of her majeſty's ſea-ſervice.

Do not theſe things inconteſtibly preſuppoſe the expediency, the neceſſity, and the legality of an impreſs in general? If they do not, one muſt entertain an opinion of the legiſlature acting and ſpeaking in this manner, which it will not be decent for me to mention in this place.

For the very notion of an exemption, when granted by ſtatute to particular perſons, and this too by way of encouragement, implieth, that without ſuch exemption, the parties intitled to the benefit of it would by law be liable to the duty or burden which is the ſubject matter of that exemption: otherwiſe the ſtatute doth nothing, it operateth upon nothing, if no legal duty or burden be removed by it. And conſequently the granting exemptions to ſeamen under certain limited qualifications, and for a limited time only, ſuppoſeth that all ſeamen in general, without ſuch exemption, were by law liable to duty or burden, which is the ſubject matter of that exemption.

And the many proviſions the legiſlature hath made to prevent abuſes with regard to theſe exemptions, attended with a plain, full and expreſs declaration, that ſuch abuſes, namely, *the extendeng the benefit of exemption beyond the intent of the legiſlature*, tend to the great hindrance and prejudice of the ſea ſervice, imply, that the duty or burden, which is the object of all this care and caution, is expedient and neceſſary to the ſervice.

And this burden is plainly an impreſs in time of war.

Which, from the authorities I have cited, appeareth to me to be grounded on common and ſtatute law; in other words, upon a general immemorial uſage, allowed, approved, and recognized by many acts of parliament.

Againſt what I have ſaid it hath been objected, that the practice of preſſing is inconſiſtent with the liberty of the ſubject, and a breach of *magna charta*.

I readily admit, that an impreſs is a reſtraint upon the natural liberty of thoſe who are liable to it: but it muſt likewiſe be admitted on the other hand, that every reſtraint upon *natural* liberty is not *eo nomine* illegal, or at all inconſiſtent with the principles of *civil* liberty. And if the reſtraint, be it to what degree ſoever, appeareth to be neceſſary to the good and welfare of the whole, and to be warranted by ſtatute law, as well as immemorial uſage, it cannot be complained of otherwiſe than as a private miſchief: which, as I ſaid at the beginning, muſt, under all governments whatſoever, be ſubmitted to for avoiding a public inconvenience.

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As to *magna charta*, it is not pretended that the practice of preſſing mariners for the public ſervice is condemned by expreſs words in that ſtatute: and if it be warranted by common and ſtatute law, it cannot be ſhewn to be illegal by any conſequences drawn from *magna charta*; in like manner as preſſing for the land ſervice could not be deemed illegal, or inconſiſtent with the principles of our conſtitution, while there were temporary acts (as there were many in the late war) to warrant it.

Beſides, we know that *magna charta* hath been expreſsly, and by name confirmed by many acts of parliament, my lord *Coke* ſaith 32; and yet the practice of preſſing mariners ſtill continued through all ages, and was never, that I know of, once mentioned in any of thoſe acts as illegal or a violation of the great charter.

In a ſimilar caſe, I mean the practice of preſſing ſoldiers for foreign ſervice, there are ſtatutes of an early date, which, I conceive, were intended againſt it; though it was practiſed long afterwards. But thoſe acts extend only to the caſe of preſſing for the land ſervice, not a word do I find in them touching the ſea-ſervice. One reaſon of the difference, among others, may be that the land ſervice was thought to be ſufficiently provided for in ordinary caſes by the military tenures; and extraordinary caſes, caſes of neceſſity, ſuch as that of a foreign invaſion, were expreſsly excepted. In thoſe caſes, ſaith the 1 *Edw.* III. *it ſhall be done as in times paſt*, which we know was by commiſſions of array; whereas no competent proviſion was made by law for the ordinary ſea-ſervice. There were no naval ſervices due to the crown, except thoſe of the cinque ports and a very few others; which all together, were too inconſiderable to be mentioned, and bore no ſort of proportion to the common exigencies of the public in the time of war.

But there is another objection, which deſerveth to be conſidered. It is, that temporary acts have from time to time been made authorizing the preſſing mariners for the ſea ſervice; from whence it is argued, that the legiſlature, which is ſuppoſed to do nothing in vain, would not have given thoſe powers for a time, if the king by his prerogative could have provided for the ſervice without the aid of ſuch temporary acts.

The gentleman who had the care of publiſhing lord chief juſtice *Hale*'s hiſtory of the pleas of the crown referreth to ſeveral temporary acts made in the late queen's time authorizing, as he ſuppoſeth, the preſſing of ſoldiers and *mariners*. I have looked into all thoſe acts. They are ſolely for preſ-

fing ſoldiers and *marines*: not a ſingle word that concerneth the preſſing of *mariners* do I find in any of them.

There was indeed an act made in the reign of *Anne* for compelling mariners into the ſervice, by methods which, it was then thought, the prerogative alone could not warrant. To that end it authoriſed and required juſtices of the peace, and other magiſtrates, to cauſe privy ſearches to be made from time to time for mariners, who, as the act expreſſeth it, "did lie hid, withdrawn, and conceal themſelves," and to deliver them, when apprehended, to conductors for the ſervice of the crown: and conſtables and other officers were, by warrants from the magiſtrates, to make privy ſearches by night, and were impowered to enter houſes and open doors in execution of ſuch warrants, and were required to give an account of their proceedings from time to time to the magiſtrates on oath, and in caſe of negligence, or remiſſneſs in the premiſes, were ſubjected to pecuniary puniſhments. This is the ſubject of the firſt nine ſections of the act; which ſections continuing in force only till the firſt of *March*, 1706, are not printed in the later editions of the ſtatutes at large.

But it cannot, I conceive, be inferred from the new powers given by this act, that an impreſs by commiſſion from the crown or by admiralty warrants which was practiſed at that very time, was illegal. All that can be inferred, is, that the ordinary methods then in uſe were found ineffectual; and therefore the legiſlature had, for that time, recourſe to an extraordinary one for compelling into the ſervice thoſe who could not be come at by the ordinary methods; thoſe, who, in the language of the act, lay hid, withdrew, and concealed themſelves. And to that end, civil magiſtrates and civil officers are required and authorized to do, what, in the judgment of the legiſlature, without the aid of that act, they could not have done, or at leaſt were not compellable to do.

And whoever readeth and conſidereth the 17th and 18th ſection of this act, which I have already cited to another purpoſe, will hardly conceive, that that parliament had any doubts concerning the legality of an impreſs by the ordinary methods of law.

Indeed the temporary acts of the 16th and 17th *Car.* I. come directly to the point. They authorized an impreſs by admiralty warrants for a limited time. And had temporary acts of that kind been frequent, or had the practice of preſſing been diſcontinued from the time of *Charles* the firſt, unleſs when revived by ſubſequent temporary acts, I think what hath been ſaid upon the foot of ancient precedents could,

could, after all, have had very little weight. For I freely declare, that ancient precedents alone, unleſs ſupported by modern practice, weigh very little with me in queſtions of this nature; I mean, in queſtions touching the prerogative. But we all know, that the practice of preſſing by admiralty warrants hath continued now near a century ſince the expiration of thoſe acts of king *Charles* the firſt, without one ſtatute of the like kind to authoriſe it.

Theſe acts of king *Charles* the firſt do indeed ſhew, that the prerogative of preſſing mariners into the publick ſervice, was however doubted of, and whoever conſidereth the peculiar circumſtances of that time, when the prerogative had in too many inſtances been carried to great lengths, and when the nation was at the very eve of a civil war, upon the ſubject of liberty and prerogative, and conſidereth withal, that a naval force muſt in all events, as things then ſtood, be provided; whoever I ſay, conſidereth theſe things, will not wonder, that the prerogative of preſſing mariners ſhould, at that very critical time, be called in queſtion; or that, in order to procure an univerſal ſubmiſſion to a meaſure neceſſary at that time, the authority of parliament ſhould be called in, in aid of the prerogative.

There was a temporary act made in this very ſeſſions for preſſing for the land ſervice. It reciteth that a rebellion was on foot in *Ireland*, and then declareth, almoſt in the words of 1 *Edw.* III. before cited, that "by law no man is compellable to go out of his county to ſerve as a ſoldier, except in caſe of neceſſity of ſudden coming of ſtrange enemies into the kingdom, or except he was bound thereto by tenure."

It is worth obſerving, that no ſuch declaration ſaving the rights of the ſubject is to be found in any of the acts of this ſeſſions for preſſing of mariners. And the different penning of theſe acts, made in the ſame ſeſſions, and touching caſes of ſo ſimilar a nature, ſhortly intimateth, that the point was not, even at that critical time, thought equally clear in the one caſe as in the other. The ſame obſervation occurreth with regard to the different penning of all the acts of the late queen for preſſing ſoldiers and mariners; and of that for preſſing mariners, the former declares, that it was neceſſary at that time of war, that ſoldiers and mariners ſhould be raiſed by the method preſcribed in the acts. "By common conſent and grant in parliament." Theſe are the words of the acts, and they are the very words made uſe of to the ſame purpoſe, in the 25th *Edw.* III. already cited. The latter, without any ſuch declaration, barely

barely impowereth and requireth magiſtrates and other peace officers, to make ſearch for and apprehend mariners, who then lay hid, withdrew and concealed themſelves, and to ſend them into the ſervice.

Lord Chief Juſtice *Hale*, in his hiſtory of the pleas of the crown, ſpeaking of the legality of preſſing, which he indeed ſeemeth to doubt of, ſaith, "He that looks upon the acts enabling preſſing of ſoldiers and mariners for foreign ſervice upon or beyond the ſea, namely *Car.* I. c. 12, 25, 26. may think that thoſe times made ſome doubt of it. But of this," ſaith he, "I deliver no opinion."

That learned man, you ſee, carrieth the inference from theſe temporary acts, no further than to render the matter doubtful, and ſo he leaveth it. But had he lived to ſee the practice of preſſing mariners continue near a century longer, and eſpecially had he ſeen this practice treated by the legiſlature in the manner the acts made ſince the revolution treat it, I think what was then but a matter of doubt would have now appeared to him in a different light. I confeſs it doth ſo to me. For rights of every kind, which ſtand upon the foot of uſage, gradually receive new ſtrength in point of light and evidence, from the continuance of that uſuage: as it implieth the tacit conſent and approbation of every ſucceſſive age, in which the uſage hath prevailed. But when the prerogative hath not only this tacit approbation of ages, the preſent as well as the former on its ſide, but is recognized, or accidently preſuppoſed, by many acts of parliament, as in the preſent caſe I think it is, I ſee no legal objection that can be made to it.

I make no apology for the length of my argument, becauſe I hope the importance of the queſtion will be thought a ſufficient excuſe for me in that reſpect. For it is no more nor leſs than, whether the only effectual method yet found out for manning our navy in the time of war, for raiſing that number of mariners, which the legiatſlure from time to time declare to be neceſſary, for defending our coaſts and protecting our trade, whether this method be legal or not, this I ſay is the queſtion. And therefore I could not ſatisfy myſelf without entering as far into the merits of it as I could.

And I have delivered my opinion upon it without any reſerve. *Foſter's* Crown Caſes, p. 154.

MONEY

MONEY-LENDING.

A View of the uſurious and unconſcionable Tranſactions of Money Lenders.

THIS is a ſubject of ſo much importance, and of a nature ſo intereſting, that it is a matter of ſurpriſe, that no treatiſe on it has as yet appeared. A work of this kind which rejects all ſyſtem and which claims no other merit, but that of compilation, will not be expected to contain a regular conſideration of the ſubject: however as far as a ſelection of the leading caſes, and ſuch an arrangement of them as the circumſtances under which a periodical work is publiſhed will admit, the Compiler will endeavour to give a view of the ſubject.

USURY is an unlawful contract upon the loan of money, to receive the ſame again with exorbitant increaſe.

By ſtatute 3 *Hen.* VIII. c. 9. A. D. 1545, the rate of intereſt was fixed at 10l. *per cent. per ann.* which the ſtatute of 13 *Eliz.* c. 8. A. D. 1570, confirms. The ſtatute 21 *Jac.* I. c. 17. A. D. 1623, reduced intereſt to 8l. *per cent.* and it having been lowered in 1650, during the uſurpation, to 6l. *per cent.* the ſame reduction was re-enacted, after the reſtoration, by ſtatute 12 *Car.* II. c. 13. A. D. 1660, and laſtly, the ſtatute 12 *Anne*, ſtat. 2. c. 16. A. D. 1713, called the ſtatute of *uſury*, has reduced it to 5l. *per cent.*

This laſt act recites as follows: "Whereas the reducing of intereſt to ten, and from thence to eight, and thence to ſix in the hundred, hath, from time to time, by experience been found very beneficial to the advancement of trade, and improvement of lands: and whereas the heavy burden of the late long and expenſive war hath been chiefly borne by the owners of the land of this kingdom, by reaſon whereof they have been neceſſitated to contract very large debts, and thereby, and by the abatement in the value of their lands are become greatly impoveriſhed: and whereas by reaſon of the great intereſt and profit which hath been made of money at home, the foreign trade of this nation

hath

hath of late years been much neglected, and at this time there is a great abatement in the value of the merchandizes, wares and commodities of this kingdom, both at home and in foreign parts whither they are tranſported: And whereas for the redreſs of theſe miſchiefs, and the preventing the increaſe of the ſame, it is abſolutely neceſſary to reduce the high rate of intereſt of ſix pounds in the hundred pounds, for a year, to the nearer proportion with intereſt allowed for money in foreign ſtates:"

It is therefore enacted, That no perſon upon any contract, which ſhall be made after the 29th of *September*, 1714, ſhall *directly* or *indirectly* take for loan of any money, wares, merchandizes or other commodities, above the value of 5l. for the forbearance of 100l. for a year; and all bonds and aſſurances for payment of any money to be lent upon uſury, whereupon or whereby there ſhall be reſerved or taken above five in the hundred, ſhall be void; and every perſon which ſhall receive, by means of *any corrupt bargain, loan, exchange, chevizance, ſhift*, or intereſt of any wares, merchandizes or other things, or by any deceitful way or means, for the forbearance or giving day of payment for one whole year, for their money or other things, above 5l. for 100l. for a year, &c. ſhall forfeit the treble value of the monies or other things lent. One moiety whereof ſhall go to the crown, and the other to the party who ſhall ſue for the ſame.

That after the ſaid 29th of *September*, 1714. "If any ſcrivener, broker or ſolicitor take above 5s. for 100l. for brokerage or procuration money, or above 12d. beſides ſtamp duties, for making or renewing any bond or bill of loan, &c. concerning the ſame, he ſhall for every offence forfeit 20l. with coſts of ſuit, and ſuffer impriſonment for half a year: the one moiety of all which forfeitures ſhall go to the crown, the other to him who ſhall ſue for the ſame, in the ſame county where the offence ſhall be committed, by action of debt, bill, plaint or information.

From a peruſal of this act of parliament, it would appear to be almoſt impoſſible to frame a proviſion, more completely fitted to the purpoſes intended: but there are few acts of parliament tending to reſtrain the ſelfiſh intereſts of man, which his ingenuity has not evaded. In this act there is not only a prohibition againſt receiving more than 5 *per cent.* intereſt for the loan of money, wares, &c. but it declares that whoever by any *ſhift* or *deceitful way* ſhall receive more than 5 *per cent.* ſhall be liable to the penalties

penalties of the act. viz. treble the value of the money, or other things lent, thereby leaving a power in a court of juſtice to judge of the real intent and ſubſtantial meaning of every tranſaction, and how far any ſhift or deceitful way is made uſe of by the parties, to cover an uſurious contract in order to evade the ſtatute.

Notwithſtanding the apparent explicitneſs of the act, various attempts have been made to evade it: but after a general review of all the inſtances in which ſuch attempts have been made, one general obſervation occurs, viz. that the ſucceſs attending the evaſions of this act, ariſes from the ſecrecy of the tranſactions, from an unwillingneſs of the parties on whom theſe impoſitions have been practiſed, to bring them before a court of juſtice, or from an ignorance of the redreſs which is there to be found; and not from any defect in the law. In treating this ſubject we can only have recourſe to thoſe caſes which have been diſcuſſed and decided by our courts of law and equity, and although perhaps they do not include every ſpecies of theſe artful and often cruel impoſitions, they will afford a ſufficient degree of information on the ſubject to enable every man of ſound underſtanding to judge by analogy, how far other tranſactions of a ſimilar nature might, in a court of law, come under the deſcription of *uſury*, or in a court of equity under the deſcription of an unconſcionable advantage, that ought not to be tolerated.

With reſpect to the policy of the acts of parliament limiting the rate of intereſt to be taken for the loan of money, it is a ſubject of mere ſpeculation, with which we have nothing to do: but with reſpect to the principle, it may be obſerved, that a man in diſtreſs for money cannot deliberate with a free and unbiaſſed power of election to accept or reject the terms propoſed; ſo far therefore his contracts ought to be guarded by the legiſlature and by courts of juſtice as they guard the contracts of infants, and others who are by the common law diſabled to bind themſelves.

We will now proceed to ſtate,

1. Attempts that have been made to evade the ſtatute of uſury.

2. Inſtances in which although the ſtatute be evaded, yet the courts of equity have afforded relief, in conſequence of the contract being unreaſonable, unconſcionable, or of its being procured by taking advantage of the party's neceſſities and diſtreſs.

Laſtly, We will conſider how far ſubſequent confirmations of ſuch contracts freely and voluntarily made, when

when all circumſtances of oppreſſion, neceſſity and diſtreſs are removed, tend to ſubſtantiate them.

In the firſt place then, It has been attempted to evade the ſtatute

By furniſhing a borrower with Goods.

As when a lender ſays to the borrower, I cannot furniſh money, but I can furniſh goods. It is to be obſerved that in order to conſtitute an uſurious contract, there muſt be a loan of money, *wares or merchandizes;* a money-lender therefore inſtead of profeſſing to *lend goods*, (by which, if he takes more than legal intereſt he would come within the ſtatute) profeſſes to *ſell them* to the perſons wanting money; who takes them at the lender's price, and by a ſubſequent ſale of the ſame goods is to raiſe the money he wants, and ſuſtains the loſs on ſuch ſecond ſale: now if goods be fairly ſold at ever ſo exorbitant a price, the bargain is good, but if the real object of ſuch a tranſaction as this, is truly to *borrow* and to *lend*, and not to *buy* and to *ſell*, then any advantage gained by ſuch a pretended treaty, for the ſale of goods beyond the legal rate of intereſt will be uſurious. As in the following caſe:

Waller, a commiſſioner of the ſtamp duties, had employed one *Lemon*, a money-broker, to raiſe the ſum of 200*l.* on a bill of exchange accepted by him. *Harris* and *Stratton*, hearing of this, ſent their broker to *Lemon*, to enquire whether *Waller* wanted money, and he told the broker he believed he did, for, to his knowledge, he had a bill to pay in a few days. The broker ſaid his principal would advance 100*l.* in money and 100*l.* in goods, but that the goods ſhould be choice ſorts, and he ſhould not loſe by them, that he ſhould have them at the warehouſe price. *Lemon*, upon this, went and informed *Waller*, that *Harris* and *Stratton's* broker had been with him, and *Waller* aſked him how they would deal, he told him what had paſſed, and that the broker had appointed him to go with *Waller*, to *Harris* and *Stratton's* warehouſe, the next day. *Waller* agreeable to this appointment, went along with *Lemon*, the next day, and found *Harris* and *Stratton* at their warehouſe; who made an apology to *Waller* for not having any money at that time, but only goods, and deſired the buſineſs might be let alone for a few days. *Lemon* called ſeveral times after this, to get a day fixed, and told them, as he had mentioned before, to their broker, that *Waller* wanted money in order to pay ſeveral demands. In the courſe of about three weeks,

Harris

Harris and *Stratton* ſaid to him, that, if *Waller* would come the next day, they would give him 50*l.* and he and *Waller* accordingly went the next day. When they came, one of the partners went out, and returned in a little time, ſaying he could not get any money, but, if *Waller* would take the whole in goods, he ſhould have them directly. *Waller* agreed; and the goods, (hoſiery ware) were ſorted out by one *Strutt*, a broker who was preſent, and delivered to *Waller*, and, at the ſame time, *Waller* delivered to *Harris* and *Stratton* the bill of exchange, and alſo an aſſignment of his ſalary, as a collateral ſecurity in caſe the bill ſhould not be paid when it ſhould become due. *Strutt* and *Lemon* carried the goods to the ſhop of *Elderton* an auctioneer, who was a ſtranger to *Waller*, and who was to ſell them, or advance the value He deſired two hours to make his calculation, and, at the end of that time, *Lemon* and *Waller* came to him, and he offered 120*l.* for the goods, ſaying, it was the utmoſt they were worth. *Waller* took the 120*l.* it being agreed, that, if they ſhould ſell for more, the ballance ſhould he accounted for by *Elderton*, and if for leſs, that *Waller* ſhould be anſwerable to him for the difference delivered. Afterwards, *Elderton* delivered an account to *Waller* of the ſale of the goods at 117*l.* 2*s.* 2*d.*

The queſtion was whether the tranſaction was a loan of money for more than 5 per cent under colour of a ſale of goods, which was left to the jury, who found the contract to be uſurious.

An application was made to the *King's-Bench* for a new trial upon the ground, that the original tranſaction was not a loan, but a ſale of goods, and, therefore, though it might be fraudulent, it was not within the meaning of the ſtatute of queen *Anne*.

Againſt the new trial it was argued that the original tranſaction was not a ſale of goods, but in fact a loan, and the caſe of *Symonds* and *Cockeril* was cited, where a rent charge of 20*l.* a year, for eight years, and two years more if A. and B. ſhould live ſo long, was granted for 100*l.* it was objected that it was a corrupt agreement, and the court held, "That if the original contract was for a rent charge, that is not uſury, but a good bargain and pennyworth, but, if the party had come to borrow the money, and then ſuch a contract enſued by ſecurity, that is uſury."

On the other ſide it was contended, that the tranſaction was really a ſale of goods; at an exorbitant and iniquitous price, to be ſure; but, ſtill, only a ſale, the price to be paid at a future day, and for which future payment, the bill of exchange and aſſignment of the ſalary were given as ſecurities

ſecurities. The firſt negociation might be for a loan; but, in the courſe of the buſineſs, it came to be merely a bargain and ſale; and as ſuch, however fraudulent and culpable, was not uſury. By the ſtatute 37 *Hen.* VIII. c. 9. intitled, "A bill againſt uſury," and revived by 13 *Eliz.* c. 8. it was made unlawful to ſell merchandize or wares, and re-purchaſe them again within three months, at a lower price. This was the only proviſion, in the acts on this ſubject, relative to the ſale of goods, and, therefore, it was to be inferred, that the legiſlature did not mean to extend the penalties againſt uſury to other caſes of ſales, however oppreſſive, or unfair.

Lord *Mansfield*—In all caſes like the preſent, the queſtion is, what is the real ſubſtance of the tranſaction, not, what is the colour and form? This is one of the ſtrongeſt caſes of the ſort I ever knew litigated. It is impoſſible to wink ſo hard, as not to ſee, that there was no idea between the parties of any thing but a loan of money. His lordſhip then recapitulated the ſtrongeſt parts of the evidence, and obſerved, that the whole complexion of the caſe ſhewed, that the only purpoſe of *Harris* and *Stratton* was, to contrive how to get more than legal intereſt. They firſt offered part in caſh; then leſs, playing *Waller* on, in order to increaſe his diſtreſs; and, at laſt, tempted him, by an offer to conclude the buſineſs immediately, if he would take the whole in goods; aſſigning to the laſt, as their reaſon for this, that they could not procure the money: they did not act as perſons ſelling goods upon credit, to be paid at a future day; but as lending on the ſecurity of the note and the aſſignment of the ſalary. The jury, therefore, had done perfectly right. Douglas Reports Page 735

The reſt of the court being clearly of the ſame opinion, a new trial was refuſed.

Where a tranſaction in real truth is a loan of money; the wit of man (ſays lord *Mansfield* in *Floyer* and *Edwards*. *Coup. Rep.*) cannot find a ſhift to take it out of the ſtatute, and though the ſtatute mentions only "for loan of moneys, wares, merchandize, or other commodities," yet any other contrivance, if the ſubſtance of it be a loan, will come under the word "indirectly." In all queſtions, therefore, *we muſt attend to the nature and ſubſtance of the tranſaction, and the object of the parties muſt be aſcertained.* In this point of view, therefore, it is not eſſentially requiſite that there ſhould be an expreſs communication or negotiation for a loan of money; for if it by any means appear that the nature and ſubſtance of the tranſaction, and the object

the

the parties was a loan, then if the goods furniſhed for the purpoſe of being ſold to raiſe money, are diſpoſed of at leſs than the price ſtipulated between the borrower and lender, the court of chancery will relieve the borrower from paying more than what the goods actually ſold for, and, no doubt, ſuch a tranſaction would be deemed in a court of law uſurious—thus in the following caſe.

BARKER wanting to raiſe a ſum of money immediately after his coming of age, applied to *Alcan*, a jew, for that purpoſe; *Alcan* recommended *Pritchard*. *Barker* told *Pritchard* he was of age, and wanted £1500. *Pritchard* told him that *Vanſommer* and *Paul* would let him have goods to that amount, which he might diſpoſe of. Upon *Pritchard* applying to *Paul*, *Paul* took ſome days to enquire into *Barker*'s circumſtances and age, and was then ſatisfied; *Barker* was intitled to an eſtate of 1200l. in reverſion, and otherwiſe about 6000l. in money, and *Vanſommer* and *Paul* agreed to let *Barker* have ſilks to that amount; *Barker* went to chooſe the ſilks and *Alcan* attended, recommended ſome ſilks and objected to others. *Vanſommer* and *Paul* packed up ſilks to the amount of 2224l. and deſired *Barker* to take them all. *Barker* gave a note as follows, "I promiſe to pay to Meſſrs. *Vanſommer* and Co. or order, the ſum of 2224l. on the 13th day of *December*, 1778, for value received, this 14th day of *December*, 1777, by me, *F. Barker* of *Wadham-College*, *Oxford*." The ſilks amounting to 177 pieces, were ſent and delivered to *Alcan*, by *Barker*'s directions. *Alcan* introduced *Rybot* as a perſon to buy the ſilk, who offered 1000l. for all the ſilks, or 700l. for the plain ones alone; both theſe were rejected, but *Barker* afterwards ſold him part of them for 600l. the remainder were taken away and put up to auction without *Barker*'s knowledge, and bought in by *Rybot* for 199l. The promiſſory note was afterwards indorſed to *John Vanſommer*, by the defendants *James Vanſommer* and *Paul*, in payment of a balance of 824l. due from *Vanſommer* and *Paul* to *John Vanſommer*, and *John* gave his note of hand (not negotiable) for the remainder of the 2224l.

Barker now applied to the Court of Chancery to compel them to deliver up this his promiſſory note upon the payment of what the ſilks really produced upon ſale, &c. *John Vanſommer* by his anſwer ſays, that the promiſſory note was indorſed to him upon a balance of an account then ſubſiſting between him (as a ſilk-throwſter) and the other defendants *James Vanſommer* and *Paul*, and denies any notice of fraud, or any dealing with *Pritchard*, *Rybot*, or *Alcan*; *James Vanſommer* and *Peter Paul*, by their anſwer deny any knowledge

of the circumſtances previous to the 24th of *December*, 1777,—ſay that *Pritchard* then applied to *Paul* for ſome ſilks, that *Alcan* choſe them—admit the note, ſay that the ſilks were in good condition, and ſold at a fair price—deny all knowledge of the ſubſequent tranſaction with *Rybot*—ſay they do not know what became of the ſilks afterwards—that they never promiſed *Barker* not to negociate the note—that they endorſed it in payment of 824l. to *John Vanſommer*—and that the remainder was made up by a note from *John Vanſommer*—that all the old faſhioned ſilks were on that account ſold conſiderably under prime coſt. *Francis Rybot* by his anſwer admits, that he was ſent to by *Alcan* to view the ſilks, that the next day he ſaw *Alcan* and *Pritchard*, and offered 1000l. for the whole, which was refuſed, that he afterwards bought part for 700l. and paid it—that 700l. was the full value of what he bought—that he underſtood them to be the property of *Barker*, that he afterwards purchaſed more of them for 199l. *Alcan* by his anſwer admits that he was preſent at the ſale of the ſilks, that he looked over them for *Barker*, that he brought *Rybot* to purchaſe them—ſays that the remainder of ſilks were taken away by *Rybot* in conſequence of his having advanced a further ſum of 150l. to *Barker*.

Mr. *Scott* for *Barker* argued, that *Barker* was intitled to the relief prayed, and cited the caſe of *Cecil*, againſt *Sutton* and *Roundtree* in the exchequer. There the defendants ſupplied the plaintiff with goods in order to enable him to negociate a note. The Court of Exchequer granted an injunction, till the amount which the goods ſold for, ſhould appear. In lord *Polworth* and *Cooke*, lord *Polworth* had applied to *Cooke* to obtain 150l. *Cooke* gave him 60l. a gold-watch, and a cremona fiddle; the court ordered an inquiry into what money lord *Polworth* really obtained by the ſale, and upon payment of that ſum, ordered the ſecurities entered into, to be given up.

Mr. *Erſkine* and Mr. *Lloyd*, for the defendants—contended, that in the caſe of Lord *Polworth* and *Cooke*, the tranſaction was merely borrowing money, whereas here, the contract was *emptio et venditio*, and endeavoured by that means to diſtinguiſh it from the other caſes mentioned by Mr. *Scott*, alſo from the caſe of *Skyrme* and *Rybot*, where *Skyrme* was introduced by *Lee*, a broker, to *Rybot* to borrow money, *Rybot* agrees to lend him 600l. on a bond, and warrant of attorney to confeſs judgment. He advanced 200l. in caſh, and the remainder in goods. The decree was to take an account of the money really and *bona fide* advanced or paid, for the uſe and benefit, or which had come to the hands of the plaintiffs, and upon payment thereof, the bond and warrant

rant of attorney to be delivered up.—They cited the duke of *Ancaſter* and *Picket*, where jewels were ſold by *Picket* to the duke, who ſold them again for leſs money, and the court of exchequer would give no relief.

Lord Chancellor on theſe circumſtances decreed as follows: It has been argued that this was a mere ſale, and therefore the Court cannot look into it. I allow that if this was in the common courſe of trade, it would be ſo: but I am to enquire if under the maſk of trading, this is not a method of lending money at an extraordinary rate of intereſt. There is no doubt that if they had talked of this as a loan of money, there would have been an end of the caſe. The queſtion then is only whether there is any method of ſhewing the Court, that they meant ſo, ſhort of their treating of it as ſuch in plain language.—There is not a doubt, that in this caſe, the tranſaction was merely for the purpoſe of raiſing money, to ſupply the neceſſities of this young man. Do they deny knowing the goods were to be ſold? I take it therefore as an advancement of goods inſtead of money, to ſupply his neceſſities. It is a queſtion of more difficulty, what is the ſum, of which the account is to be taken, whether the value of the goods, or the ſum really made. In the caſe in 1 *Eq. Abr.* 91. the Court thought proper to charge the perſon only with what he really made of the goods, and this is the proper rule, for the perſon advancing the goods, knows they are not to be ſold in the ſhop, but in the lump, at a different kind of market, and that what can be got for them, in that way, is all that will redound to the benefit of the party to whom they are advanced; this lays out of the caſe the value they were of to be ſold in the ſhop. His lordſhip directed an account of what ſilks came to the hands of *Rybot*, and under what contract, and with what privity, and alſo of the value of the other goods, and an enquiry as to the indorſement of the note to *John Vanſommer*, from *Vanſommer* and *Paul*, and reſerved further directions. *Barker v. Vanſommer* and others. 1 *Brown's Reports*, 149. 1782.

Another mode attempted for the evaſion of the ſtatute has been by means of

CONTINGENT CONTRACTS.

THIS is by inſerting in the bargain a hazard or contingency, whereby the lender runs the hazard of loſing his money both principal and intereſt, in caſe of any uncertain future

future event: as if for inſtance, a man lends money, not to be paid if an event ſhould happen one way; but double the ſum if the other, and it is uncertain which way it will happen: ſuch a contract as this cannot be uſurious, for the additional increaſe is not given for the loan or forbearance, but for the riſque, and it is reaſonable that where a man riſques the loſs of money altogether, he ſhould receive a premium proportionable to the hazard. This was a principle not to be neglected by money lenders, they therefore adopted the practice of introducing a contingency in their contracts with needy borrowers, but ſuch a contingency as was not within the bounds of probability to happen; and reſerving a premium ſuited to the extent of the borrower's diſtreſs and their own rapacity—thus for inſtance money had been lent, reſerving a large uſurious increaſe the principal ſum not to be repaid, in caſe three perſons were dead at the end of ſix months. Now as it was not likely that ſuch a contingency ſhould happen as three healthy perſons dying in ſix months, the lender thought himſelf entitled to the premium on the principle of the hazard: but the Courts of law took upon them in ſuch caſes to judge of the fairneſs or ſlightneſs of the hazard, and where it appears that the contingency is inſerted merely as a colourable pretext to cover an uſurious loan, they have decided it to come within the ſtatute of uſury. And on the ſame principle to purchaſe an annuity at ever ſuch an under price cannot be uſury, becauſe the payment ceaſes when the life drops, and there is a hazard. If however the annuity was granted on a communication for the loan of money, and the circumſtances of the caſe ſhew that the annuity was a mere device to ſecure uſurious intereſt, it will be within the ſtatute. The following is an important and learned caſe on this ſubject.

Mr. SPENCER, being in poſſeſſion of an eſtate of 7000*l.* a year, and of a perſonal eſtate in goods and plate &c. worth 20,000*l.* and owing about 20,000*l.* to tradeſmen, being about 30 years of age, of a hale conſtitution, but impaired by irregularity, made a propoſal to the defendant Sir *Abraham Janſſen*, that for 5000*l.* paid down, he would engage to pay 10,000*l.* if he ſurvived the dutcheſs of *Marlborough* his grand-mother, from whom he expected a conſiderable fortune: the propoſal was accepted, Sir *Abraham* paid the 5000*l.* and *Spencer*, gave him a bond for the payment of the 10,000*l.* in ſix months after the death of the dutcheſs, in caſe he ſhould then be living. The dutcheſs lived ſix years after and died leaving Mr. *Spencer* a conſide-

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rable eſtate. Then Mr. *Spencer* confeſſed a judgment to Sir *Abraham* for 10,000*l.* and afterwards paid him 2000*l.* in part of it, and then died about a year and eight months after the dutcheſs. Mr. *Spencer*'s executors filed a bill for the purpoſe of relieving his eſtate againſt this demand, upon payment of the principal ſum of 5000*l.* with legal intereſt, on the ground of its being an uſurious, and unconſcionable bargain, and againſt the publick good.

In the deciſion of this cauſe three queſtions were diſcuſſed, viz.

1. Whether this was not an uſurious contract within the ſtatute of uſury, as being a greater premium than the law allows.

2. That if it was not uſurious; whether it was not ſuch an unconſcionable bargain, as would warrant a Court of equity in relieving the eſtate of *Spencer* from the demand.

3. That if the Court would relieve, whether it could do ſo, under the circumſtance of Mr. *Spencer*'s having confirmed the bargain after the death of the dutcheſs, by confeſſing the judgment and paying 2000*l.* in part of the 10,000*l.* which he had contracted to pay.

The firſt queſtion, viz. whether this was an uſurious tranſaction made void by the ſtatute, is the only part of the caſe to be noticed in this place, the other queſtions will come in due order: the lord chancellor had called in the aſſiſtance of the judges who delivered their opinions as follows:

Mr. Juſtice Burnett. As to the firſt point, whether the loan of 5000*l.* to be paid 10,000*l.* on the death of the dutcheſs if he ſurvived her, but nothing if he died before, was an uſurious contract or a mere caſual, contingent bargain? I hope, I may be excuſed in calling it a loan; becauſe, although in a caſe, where the capital is not in all events to be paid, the word may be improper in Courts of law, this Court at leaſt has adopted that uſe of this word in reſpect to a mere contingent bargain, that of *Bottomry*. If this conduct be uſurious, it muſt be becauſe it is contrary to the expreſs words of the ſtatute, or an evaſion of it. It would be miſpending the time of the Court to enter into the old notions of uſury, and the condemnation of it by Canoniſts, Civilians, and ſome common lawyers; becauſe all thoſe expreſſions depend upon a principle, which is out of the preſent caſe. The common lawyers differ; there being great opinions either way. Lord *Coke* ſeems to call all uſury unlawful. 2 *Inſt.* 89. 3 *Inſt.* 151. but in *Hard.* 420, lord *Hale* ſays, the *Jewiſh* uſury only is prohibited by the common law: and the true ſpirit of uſury lies in taking an unreaſonable or

unjuſt advantage of their fellow creatures. But it muſt be agreed that nothing is legally uſurious, that is not prohibited by the *Statute* 37 *H.* VIII. 9. which leading ſtatute is followed by the reſt; the 12 *Anne*, 16. varying from it only in reducing the legal intereſt: the caſes determined on the firſt ſtatute have been therefore always looked on as authorities on any of the ſubſequent. Therefore to make a contract uſurious within the expreſs words of the ſtatute, the record muſt be taken for forbearance or giving a day of payment; and whatever ſhift is uſed, it will be uſury: but not within the ſtatute where it is otherwiſe. If in truth it was a ſum advanced by way of loan, and the reward in truth given for forbearance, no ſhift will prevail. I ſhall better explain myſelf by the inſtances I ſhall put. Suppoſe there is a purchaſe of an annuity at ever ſuch an under price, if the bargain really was for an annuity, it cannot be uſury: but if the communication was about borrowing and lending, it may be uſury within the ſtatute: and how? If by reaſon of all the circumſtances, and of the communication, the exility of the ſum given, the original contract being a borrowing and lending, the Court thinks the annuity was a mere device to pay the principal with uſurious intereſt to evade the ſtatute, this will be within the ſtatute; though on the face of the bargain it appears ever ſo fair a ſale of an annuity: the contrivance of the annuity, as the uſurious reward for the loan of money, ſhall not evade the ſtatute made for the benefit of mankind. This I take to be the ſum and ſubſtance collected out of the ſeveral caſes. *Cr. E.* 27. 4 *Leo.* 208. *Noy.* 151. 1 *Brow.* 180. *and* 2 *Lev.* 7. So a bargain on a mere contingency, where the reward is given for the riſk and not for the forbearance, will not be within the ſtatute: but otherwiſe if the intent was to have a ſhift; which was *Cr. E.* 642. 3. If therefore a man gives or lends money, not to be paid if the event ſhould be one way, but double if the other, and it is uncertain which way it will happen, it is not within the ſtatute; for the reward is given for the riſk, not forbearance, but if under colour of ſuch an hazardous bargain the real treaty is for a loan, with an uſurious reward for that loan, and to evade the ſtatute, the contingency inſerted is of little moment, being no ingredient between the parties: the Court or a jury on the whole may pronounce ſuch a contract uſurious, notwithſtanding the colour of contingency, if they are ſatisfied, the reward is given for forbearance, not for the riſk; as in the adding a ſingle life, which is a healthy life, if that life ſhould ſurvive half a year: ſo they might as well add a

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contingency, if any one of ſix perſons was alive at the end of ſix months: and one of the caſes is, if any one of three perſons is alive at that time. The intent of the bargain is the material thing: if that was the borrowing of money, it is within the ſtatute, whatever colourable contingency is inſerted: and this is the caſe in all the reſolutions in ſeveral caſes. 5 *Co.* 69. 70. 2 *And.* 15. *Mo.* 397. and *Maſon* v. *Abdy*. But where the principal was fairly and truly put in hazard, and ſuch as none would run for the intereſt the law allows, there is no caſe where it has been held within the ſtatute. The ſlightneſs or reality of the riſk ſeems to be the only rule directing the judgment of the Court: *Cr. E.* 741. *Bedingfield* v. *Aſhley;* in 3 *Keb.* 304. *Long* v. *Wharton*, which though inaccurately reported ſeems to me good law. I cannot ſee two contracts bearing a greater ſimilitude than this and *Bottomry*. A life may be inſured: ſo may a ſhip, which may ſink a day after: ſo may the party die: one is as much an adventure as the other. It was endeavoured to diſtinguiſh *Bottomry* from every other contract upon this, that though above what the law allows upon a loan, yet *Bottomry* contracts were eſtabliſhed in favour of trade, there being a riſk of the principal, and they being neceſſary for trade and commerce. But whatever favour the Court may ſhew to ſuch contracts, they will never eſtabliſh them upon the deſtruction of a ſtatute; and the principle of the Court thereon was, that the *Bottomry* bond was not within the ſtatute; nor could it be; for it is plain, that a real riſk was run, that the principal may never be payable; therefore it cannot be given for forbearance, but grounded merely upon the contingency, the riſk. But as a colourable contingency in caſe of a life annexed to the payment may make that bond uſurious, ſo will a colourable contingency annexed to a *Bottomry* contract: as in a bond, if one out of twenty ſhips, bound from *Newcaſtle* to *London*, arrrived ſafe; that would be a contingency thrown in to evade the ſtatute, which would be too hard for ſuch a bond: ſo if ſuch a contract is made, if a pacquet ſhould return to *Dover* from *Calais*, at a ſeaſon of the year in which there is no danger: and this I may ſay with the more ſecurity, as *Joy* verſus *Kent, Hard.* 418. is an expreſs proof of it; where a *Bottomry* bond was ſent to be tried, whether it was an evaſion of the ſtatute; which would not have been ſo, if it could not have been an evaſion. Indeed Lord *Hale* throws out expreſſions very favourable to trade, but ſo inaccurate in that book, that I do not think they could be ſuch as came out of the

mouth of a great man. His *dictums* then are of no authority. One of the firſt caſes of *Bottomry*, which came in queſtion, was *Sharpley* verſus *Hurrel*, *Cro. Jac.* 208. What the Court goes on there, is the real riſk of receiving leſs; which is cited again in *Roberts* verſus *Tremayn* 2 *Roll.* 47, and *Cr. J.* 508. which differed from the other. In *Soome* verſus *Glen*, as in 1 *Sid.* 27. the reſolution is founded on the real hazard of the principal, which cannot be within the ſtatute. On the whole therefore I am of opinion, that this is not a contract founded in its origin upon uſury, but a contingent bargain, and conſequently within the expreſs words or intent of none of the ſtatutes of uſury.

Sir John Strange, *Maſter of the Rolls*. As to the firſt point I concur in opinion, that this is not an illegal agreement made void by the ſtatutes of uſury: the prohibition will ſtand on the word and meaning of 12 *Anne* 16. for that does materially differ from 21 *J.* 1. or 12. *C.* 2. and appears calculated for ſuch loans, wherein two principal circumſtances muſt concur: agreement to give and receive an allowance of profit in the mean time, for the money hired in a greater proportion than allowed by the ſtatutes: neither of which circumſtances occur in the preſent caſe. The repayment of the money advanced depended on a contingency, which if it happened one way, the whole was totally loſt: during the pendency of this no intereſt or profit could accrue to Sir *Abraham Janſſen*, but a mere wager or bargain upon a contingency which died firſt: ſo that the whole was a hazard. It is objected, that though the letter of the contract may be ſo, yet if the deſign of the parties was to borrow 5000*l.* and one ſhould give a greater intereſt for the money, than the law allows, the putting it into this ſhape will not evade the ſtatute, in which ſtatute are very general words to take in all covins, ſhifts, &c. which I agree to: and therefore if the Court can ſatisfy itſelf, that this was not in reality a bargain, whereon the principal was deſigned to be at hazard, and the ſhape, in which it was put, was only a contrivance to evade the ſtatute, it will be uſury, and conſequently void. Whether the agreement is uſurious, or not, may be determined two ways. Firſt, By verdict of a jury on a plea of the corrupt agreement: ſecondly, By the Courts exerciſing their own judgment on the circumſtances of the caſe diſcloſed to them. The firſt of theſe methods could not be taken in this caſe; becauſe it appears, the bond was cancelled upon the giving the judgment after the death of the grand-mother, and therefore no action could be brought on it.

Wherever

Wherever the Court has ſeen, that the contingency to put the principal in hazard is only added colourably, and only a nominal riſk, the Court to prevent an evaſion of the ſtatute has determined it to be uſury; as in *Clayton*'s caſe, 5 *Co.* and other caſes, where the adding the contingency to a ſingle perſon's being alive at the end of a year was only a ſhift. So by *Holt*, *Comb.* 125. and *Carth.* 68. But a wager between two to have 40 for 20, if one was alive at a future day, would not be uſury. *Cr. El.* 642. *Button* againſt *Downham*, and in 1 *Lut.* 470. Notice is taken of its appearing, that both principal and intereſt was at hazard. The preſent caſe is fully before the Court, and proper for the exerciſe of their judgment. To ſay it is uſury, the Court muſt be convinced, that it was the deſign of Sir *Abraham Janſſen* to make a loan of this, and to ſecure exorbitant profit for it, and calculated as a ſhift to evade the ſtatute. But I cannot think either from the evidence or the anſwer of Sir *Abraham Janſſen*, that it was the ſcheme, or even in contemplation of the party. It appears a mere wager, which of the two ſhould outlive the other. The 5000l. was actually advanced, not colourably; therefore none of the caſes cited prove this to be within the ſtatute of uſury, or warrant the Court to declare it void thereon. The word *lend* on which ſome ſtreſs was laid, concludes nothing. Every advancement of money on *bottomry* is a loan; but it was properly obſerved to be called ſo in the acts of parliament; but it is the nature of the agreement and intent of the parties, into which the Court muſt look to determine the queſtion. *Cr. El.* 642, puts it intirely on the queſtion, Whether it was the intent of the parties to be a wager or a loan at intereſt. So in *Mo.* 398, it has been argued, that lending money on *bottomry*, where more is taken than the legal intereſt, is grounded on the conſideration of the profit of trade; and therefore it is ſaid not to be applicable: that certainly has been one reaſon, why ſo large a profit for the uſe of money has been allowed in that inſtance: but the general reaſon has been the not coming within the intent of the ſtatute; for if it had, the Court could not depart from it: but the hazard the lender runs, of never ſeeing a penny of his principal or any of his intereſt, takes it out thereof: and that holds as ſtrong in the preſent caſe; and is ſo laid down in general, where the principal and intereſt is at hazard. 1 *Sho.* 8. *Maſon* verſus *Abdy*, and in *Sid.* 27, a diverſity is taken between a bargain and a loan. Whether a hazard or not, is conſidered as a rule for determining whether a bargain or loan. I am of opinion therefore, this

this bond does not come within the ſtatute of uſury, and cannot be declared void at law thereon.

Lee, Chief Juſtice. The firſt point is, Whether on the evidence before the Court relating to this tranſaction there is ſufficient appearing to determine this contract uſurious. As to the nature of uſury, conſidering it at common law, or in the law of nature, or divine law, or the civil law of other countries (of which there is a large account in *Pal.* 291.) it is unneceſſary to ſpend time on this ſubject; becauſe the idea of uſury is fully ſettled in this country by the legiſlature, which has made uſe of all the words, the language could furniſh, to prevent taking more than the legal intereſt, in which uſury conſiſts: and to attain this end the borrower is at liberty to diſcloſe every circumſtance of the contract, that it might appear, whether there was any ſhift, &c. It appears by 2 *And.* 15. and *Maſon* againſt *Abdy*, *Carth.* where the difference is taken and ſettled, that where the hazard of loſing the intereſt is but a colourable contingency, the agreement is uſurious: but where the contingency is real, it is otherwiſe. I think that is the material conſideration, and the ſubſtantial and true reaſon, that *bottomry*-bonds are not conſidered as uſurious on the conſtruction of the ſtatute itſelf; there not being words in the ſtatute to reach *bottomry*-bonds, when they run a deſperate contingency of winds, ſeas and enemies; the reaſons touching trade not being the true reaſons, although they might be inducements to Courts to conſtrue the ſtatutes in a favourable way. So if on advancement of money by way of loan the lender will by an agreement between the parties, in whatever manner formed, have the repayment of the principal with profit exceeding the legal intereſt, that will be corrupt within the ſtatute of uſury. If therefore, two perſons ſpeaking together, one deſires 100l. and for the loan will give more than the law allows, and for an evaſion of the ſtatute a practice is invented, that the borrower ſhall grant 30l. *per annum* for ſo many years, this practice is within the ſtatute, and will be uſury, although the lender never has his 100l. again; for by this bargain by way of loan he has full ſatisfaction for his 100l. and more profit than the law allows; which brings the preſent caſe to the ſingle conſideration, whether the hazard, Sir *Abraham Janſſen* runs, of loſing the whole principal without ſatisfaction for the money advanced, was not a real hazard, which might require a reward beyond the legal and common intereſt: and where that is the caſe, it appears from all the authorities, that all bottoms on this in the

Courts

Courts of law, that it is always thought, where the profits, the lender is to have, is as a reward for the hazard he is ſubject to, and not for the forbearance of the day of payment (which are the words of the ſtatute) they are not uſurious. In *Molloy* 314, 317, it appears, theſe real contingencies are not within the ſtatute of uſury on this foundation.

Lord Chancellor. The firſt is a mere queſtion at law upon the ſtatute of uſury, and on the rules of law, and the ſame as in a Court of law, if an action had been brought on the bond, and the whole matter had been diſcloſed in ſpecial pleading. If I had even now a doubt concerning it, I ſhould have held myſelf bound by the opinion of the judges as a matter within conſcience, in like manner if I had ſent this to be tried at law; in which caſe this Court always decrees conſequentially to the trial. But I have no doubt about it: and concur in opinion. This queſtion was laboured by Mr. *Spencer*'s counſel; many authorities cited; and ſtrong inquiries made by them. I do not intend to go through them: but contracts on contingency are to be diſtinguiſhed plainly; for a wager on chance is not within the ſtatute, becauſe no loan. But if there is a loan of money with an agreement to receive back more than the principal and legal intereſt in any event, there, though a contingency is thrown in, on which the whole principal and intereſt may be loſt by a poſſibility, it is uſurious and contrary to the ſtatute. On this it was inſiſted for *Spencer*'s executors. I will not now enter into a critical diſpute, how far any ſuch contract, whereby the falling out of the contingency one way or other the money may be loſt, is in ſtrictneſs a loan. The civil law has very nice and refined diſtinctions upon this: *commodatum et mutuatum* are their technical terms for a loan. By the firſt was meant, where the things lent were to be reſtored in *ſpecie:* by the ſecond, where in *genere* only: but in both the things were to be reſtored in all events, and nothing was to be paid for the uſe or hire: which when it was ſo, was *locatum et conductum* by the *Roman* lawyers; under which perhaps all our laws would ſtrictly come. But theſe minute diſtinctions upon loans are not adopted by us; but we mix and confound their *commodatum & mutuutum;* as appears in an action upon a loan, which takes in both. So though intereſt is to be paid for it, it is with us ſtill a loan. So though money is to be advanced upon a riſk, which upon a contingency may be totally loſt, it is ſtill a loan of money; and all the books treating of *bottomry*, call it money lent upon *bottomry.*

tomry. Beſides this is plain by the expreſs words of the ſtatute 11 *H.* VII. 8. which ſhews, they underſtood, that an adventure might be inſerted in a contract or loan: and it is obſervable, that this, if real and fair, exempted it from the laws of uſury; though at that time all kind of uſury or taking intereſt was unlawful. By the law of *England* therefore the inſertion of a contingency will not of itſelf prevent a contract being a loan. Conſider the reſult of the caſes cited on the ſtatute of uſury; which I will not repeat, but only deduce proper and natural inferences from them.—Firſt, If there is a loan on contingency, in conſideration whereof a higher intereſt than the law allows, is contracted for forbearance, if there be a riſk only of the intereſt or *premium*, and not of the principal alſo, though a real and ſubſtantial riſk is inſerted, it is contrary to the ſtatute; becauſe the money lent is not in hazard, but ſafe at all events; and no regard is then had, whether the contingency is real or colourable; as appears from what *Dodderidge J.* ſays in *Roberts* verſus *Tremayn*; who by the way takes it for granted, that ſuch a loan may be had with us on contingency. Next, if the contingency extends to both, and there is a higher rate than the law allows, regard is had, whether a *bona fide* riſk is created by the contingency; or whether only colourable; for if ſo, Courts of law hold it contrary to the ſtatute, becauſe it is an evaſion to get out of the ſtatute; which is prohibited by the law itſelf. *Clayton*'s caſe, 5 Co. 70, and the caſe put by *Popham* in *Burton*'s caſe immediately preceding. So in *Maſon* verſus *Abdy*. But where the contingency has extended to principal and intereſt both, and not colourable only, but a fair and ſubſtantial riſk is created of the whole, it takes it out of the ſtatute; though called a loan, it is conſidered as a bargain of chance, and differs little from a wager. On this depends the caſe of *bottomry;* for I agree, that the approving thereof is from their being fair contracts on a real hazard, and not that they concern trade; though trade and commerce is taken into conſideration, but not alone relied on to ſupport uſury; for that cannot be. The counſel for *Spencer*'s executors object to this by laying ſtreſs on certain expreſſions and *dictums* of judges in ſome caſes, that there muſt be no tranſaction or communication of borrowing and lending; and care muſt be taken, that there be no ſuch; and therefore as the firſt propoſal in the preſent caſe was to borrow money on a contract to pay two for one, it is uſurious notwithſtanding the contingency thrown in. A very right anſwer has been already given; that Courts of juſtice are to regard the ſubſtance of things on a contract,

and

and not mere words, which might be inaccurately uſed by the parties in private dealing. But another anſwer may be given: that in the moſt accurate books theſe expreſſions are applied to caſes ariſing on purchaſe of an annuity or ſale of goods or merchandize at a *premium* or advanced profit beyond the rate of legal intereſt; in which caſes theſe expreſſions are properly applicable; but cannot be ſo to loans of contingency; that is a fair, real contingency; for there, from the nature of the thing, the communication muſt be about the borrowing and lending; as is plain from the caſe of *bottomry;* and the caſe put by *Dodderidge* Judge, in terms is of lending 100l. &c. upon a caſualty, if it goes to the intereſt only, and not the principal, it is uſury, which he clears by the caſe of *bottomry*. The very ſtating of the caſe on the purchaſe of an annuity or ſale of goods proves the truth of this. An annuity may be purchaſed at as low a rate as you can, provided it was the original negociation to purchaſe and ſell an annuity: but if the treaty began about borrowing and lending, and each in the purchaſe of an annuity, it is evident that it was only a method of contrivance to ſplit the payment of the principal with uſurious intereſt into ſeveral inſtalments, and conſequently that it was a ſhift; which is *Fuller*'s caſe and *Tanfield*'s, 4 *Leon* and *Noy* 151, which I take to have been on the ſame deed as that in 1 *Brownlow*. So in the ſale of goods and merchandize it is lawful to ſell as dear as you can, on a clear bargain by way of ſale: but if it is firſt purpoſed to borrow, and then to ſell goods beyond the market, this is uſurious, of which there are two caſes in *Mo.* 397. The very putting theſe caſes ſhew how very proper and forcible thoſe expreſſions of the judges beforementioned are, when uſed in the purchaſe of an annuity and ſale of goods; but how improper when thrown out in caſes of loans of money on contingency. *Cheſterfield* and *Janſſen*, 2 *Veſey's Rep.* 125. *Atkin's Rep.* 301. A. D. 1750.

It has been obſerved that a man may bargain for an annuity at as cheap a rate as he can, and however good his bargain may be, it will not be uſurious, unleſs the real ſubſtance of the tranſaction be a lending of money, and a ſlight colourable contingency be inſerted to evade the ſtatute.

Brown received 35l. from one *Heighway* for the forbearance of 420l. from the 20th of *December*, 1772, to the 20th of *June* 1773. One *Richards* hearing of the tranſaction, brought an action to recover from *Brown* under the ſtatute of *uſury* the treble value of the money lent, a moiety for the

crown

crown and a moiety for himſelf. At the trial *Richard Heighway* who was the borrower of the money, and the only witneſs as to the tranſaction, ſaid, that he borrowed of *Brown* 200l. in the year 1769, which was ſettled ſix months after. That on the 25th of *September* 1770, he applied to *Brown* to *lend* him 600l. ſaying he was owner of 2042l. bank annuities veſted in truſtees, to be tranſferred to him upon making out his title to an eſtate, which was very clear; and ſhewed *Brown* the declaration of truſt. *Brown* ſaid, he would *lend* him 600l. or 1000l. and ſupplied him with 200l. for which *Heighway* gave him a bond, and depoſited the declaration of truſt as a collateral ſecurity; and *Brown promiſed* he ſhould have the *remaining* 400l. in a *fortnight's time*. On the 17th of *September*, *Heighway* called for the other 400l. *Brown* then told him money was very ſcarce, upon the proſpect of a *Spaniſh* war. *Heighway* preſſed him very much; upon which he ſaid he would ſee what could be done, and told him to call the next day. *Heighway* did ſo in the morning; but *Brown* was not at home. He called again in the evening, and then ſaw him, who ſaid he was afraid he could not raiſe it himſelf, but would try to get it of a friend in the city, who never was without money; but he was *a very hard man*. *Heighway* aſked what his terms were, *Brown* ſaid, they were ſo exorbitant he was almoſt aſhamed to name them. *Heighway* ſaid he would rather pay twenty or thirty guineas than not have the money. *Brown* ſaid, his friend was not ſo hard as that; but that he never *lent money but* upon *annuity* at *ſix year's* purchaſe; however, ſaid *Brown*, "If you will take the money on thoſe terms I will engage to furniſh you with money to redeem in *three months* time. The quarter's annuity will come but to 17l. 10s. which will be better than giving twenty or thirty guineas." This being agreed to, on the 20th of *September* 1770, *Heighway* called upon *Brown* for the money, and found a bond and warrant of attorney, &c. prepared for ſecuring an annuity from him to one *Waters*. *Heighway* executed it, and *Brown* ſigned it as the ſubſcribing witneſs. After the bond was executed, *Brown* ſaid, he was always uſed to have 5l. *per cent. procuration money*; but as *Heighway* was diſtreſſed he would only take *two and a half per cent.* and accordingly took fifteen guineas, and *Heighway* left the declaration of truſt with him. *Heighway* ſaid, "That *Brown firſt propoſed an annuity: he himſelf would not have granted one.*" When the firſt quarter's annuity was due, *Heighway* applied to *Brown*, and preſſed him for the money

to

to redeem, as he had promiſed. *Brown* refuſed. He then aſked for the declaration of truſt: *Brown* ſaid, if he inſiſted upon it, *Waters* would enter up judgment. *Heighway* inſiſted upon it; and judgment was entered up. *Heighway* paid *Brown one year and one quarter's annuity* and one quarter to *Brown*'s partner. *Brown* often denied that he had promiſed *Heighway* money to redeem; and ſaid he wondered how he could expect him to lend him money at 5l. *per cent.* when others made 10l. and a half *per cent.* of their money. Afterwards *Brown* acknowledged that he was himſelf the *principal* that advanced the money, and enjoyed the annuity; and ſaid, that Mr. *Waters*, whoſe name had been made uſe of, was his truſtee. *Waters* ſwore that *Brown* had ſometimes purchaſed annuities in his name, but that he knew nothing of *this*. Lord *Mansfield* told the jury, if they were ſatisfied that, in the contemplation of the parties, this tranſaction was a purchaſe by the one, and a ſale by the other, of a real annuity, how much ſoever they might diſapprove of, or condemn *Brown*'s conduct, they muſt find a verdict for him. But on the contrary, if it ſhould appear to them to be in reality and truth the intention of both parties, the one to *borrow*, and the other to *lend*; and that the form of an annuity was only a mode forced on the neceſſity of the borrower, by the lender, under colour of which he might take an uſurious and exorbitant advantage, then they might find for *Richards*, notwithſtanding the contingency of the annuity dying within three months, more eſpecially as it was underſtood by both, that the annuity, at the expiration of three months, was to aſſume the direct ſhape of a loan.

The jury ſaid they agreed with lord *Mansfield* in deteſting the tranſaction, but they thought *there was an annuity*. His Lordſhip repeated his former direction to them; they retired again, and at length found a verdict for *Richards*, by which he became entitled to treble the value of the money lent. *Brown* applied to the Court of *King's Bench* for a new trial.

On the part of *Richards* and againſt a new trial, his counſel ſtated the queſtion to be, whether the evidence given at the trial amounted to proof of a loan, for if it did, no ſhift or contrivance, no riſk or chance, could take it out of the ſtatute; and they contended, that clearly and manifeſtly upon the face of the tranſaction, it imported a loan, and that the form of an annuity, under which it was diſguiſed, was merely a contrivance to evade the ſtatute. 1. The application of *Heighway* was expreſsly and in terms an application for a *loan*. *Brown* actually advanced part of the money at that time; and promiſed to *lend* him the remainder in a fortnight.

fortnight. The ſubſequent treaty for the remainder, on the part of *Heighway*, was clearly for a *loan*, and the propoſal of turning it into an annuity came from *Brown*. But even at that time, the idea of its being a *loan* was ſo ſtrong in *his* mind, as well as in that of *Richards*, that the anſwer he gives *Richards* is, "that his friend never *lends money*, *but* in the *form of an annuity; not*, that he *never lent money*, but *only dealt in the purchaſe of annuities*, or any declaration of that kind, which might ſhew that he would not be concerned where the tranſaction was to be a loan. But whether a tranſaction is a loan or not, is a matter of fact which depends upon the intention of the parties; therefore clearly proper for the jury; and here, they have found the tranſaction was a loan. If ſo, the riſk of the borrower dying within three months, will not prevent its being uſury. It is true, this is a caſe upon the ſtatute: but the old caſes go upon the ſame principle, they are all collected in the caſe of Lord *Cheſterfield* againſt *Janſſen*, and they all agree that the material point to be conſidered is, whether there is a *communication for a loan of money*. In that caſe Mr. Juſtice *Burnet* ſays, "If a man *purchaſe* an *annuity* at ever ſuch an *under price*, if the bargain was *really* for an *annuity*, it is not *uſury*; if on the the foot of *borrowing*, and *lending* it is *otherwiſe;* but if the Court are of opinion, the annuity is *not* the *real contract*, but a *method* of paying *more money* for the reward or intereſt *than the law allows*, it is a *contrivance* that ſhall not avoid the ſtatute, by giving the avarice of one kind of men an opportunity of preying upon the neceſſities of another." And the caſe put by lord *Hardwicke*, in giving his opinion upon the ſame queſtion, is preciſely the very caſe. "A man," ſays his lordſhip, "may purchaſe an annuity on as low terms as he can: but *if he ſets out* with *borrowing* a ſum money, and *then turns it into the ſhape of an annuity* afterwards, this is a *ſhift* and an evaſion to avoid the ſtatute." Here, the original application and the ſubſequent treaty were for a loan, and nothing elſe. Then *Brown* propoſes to change it for an annuity. That was a mere ſhift to evade the ſtatute: the man was in perfect health; little or no chance of his death, ſo as to create any thing more than a mere colourable riſk, and the intention of *Brown* was only to avoid the penalty of the law. Therefore they prayed the rule for a new trial might be diſcharged, and the verdict againſt *Brown* to be confirmed.

On the other hand in behalf of *Brown* it was argued as follows: it is ſaid that this is not a fair *bona fide* communication for the *purchaſe* of an annuity, but a mere *contrivance*

to

to get more than legal intereſt. As to that, we agree, if it was a mere contrivance to get more than legal intereſt *by way of loan*, it would be uſury; for the true diſtinction clearly is whether the tranſaction is real, or colourable only. But if the contract is for a *real* annuity, however, unfair, or even groſsly foul, the bargain may be on the part of the grantee, in taking advantage of the neceſſities and diſtreſs of the grantor, ſtill it will not be uſury. What then is the tranſaction here? Not a *contrivance* to diſguiſe a *loan* under colour of an annuity, but to *force Heighway* into *granting* an *annuity*, when he wanted to have a *loan*. That may be extortion and oppreſſion; but ſtill it is a real annuity, and no loan; conſequently, not within the ſtatute. But it is ſaid, there was a communication, and an *abſolute agreement* to *borrow*, entered into; and therefore, its being changed into an annuity afterwards will not vary the caſe. It is not diſputed, that where the tranſaction is really a loan, the *colour* of an annuity cannot gloſs it over. But, though there be a communication for a loan at firſt, if the *final* agreement is *not to lend*, but for the one to ſell, and the other to purchaſe a real annuity, it is not uſury: and ſo it is expreſsy laid down by Lord *Hardwicke* in *Cheſterfield* and *Janſſen*, "The ſubſtance of the agreement, and not the mere expreſſion only, is to decide." What then is the ſubſtance here? The accuſation againſt the defendant *Brown* is of a promiſe to lend, and afterwards refuſing; but that he had a friend who would let him have the money upon annuity. This, *Heighway* agrees to. Is not that a bargain for a real annuity? For the loan is abſolutely refuſed. The next ground of accuſation is, that *Brown* promiſed to *lend* him money to *redeem* the annuity. What? Redeem *that*, which it was underſtood by both parties *never exiſted*. Again: *Heighway* repeatedly applies to redeem; and complains becauſe *Brown* will not conſent. He even pays the annuity from *December* 1770, to *June* 1773, *as an annuity*. All this ſhews, that in his own mind, he was conſcious the tranſaction and agreement was *ſubſtantially a real annuity*, and *not a loan*. On the other hand, what was the ſituation of *Brown*? He could not have compelled *Heighway* to redeem; for a *liberty to redeem* which is all there was in this caſe, is not a *contract* to redeem. Therefore, if *Waters*'s life had been ſuſpicious, he was at the mercy of *Heighway*, whether the riſk ſhould continue or not. Upon the whole, this is manifeſtly no loan, nor a corrupt bargain for forbearance of the principal money: and there can be no uſury by conſtruction. The utmoſt that could have been done in this caſe, if the whole tranſaction had appeared

appeared in a Court of equity, would have been, for the Court to decree that he ſhould be permitted to redeem. Therefore, he prayed that a new trial might be granted.

Lord *Mansfield*. The nature of this queſtion, the importance of it to the public and to *Brown*, and tenderneſs to his character, made me deſirous that this motion for a new trial ſhould be made; though I had no doubt of the propriety of the direction I gave the jury at the trial.

The great objection at the trial was to the credibility of *Heighway*'s evidence. As to that *the facts of the caſe* could be known only to him and *Brown*, with reſpect to his concern or intereſt in the preſent action, *Heighway* was thoroughly purged on his examination at the trial. The objections to his credit were laboured with all the ſtrength of argument that ingenuity and ability could furniſh, the jury had all theſe obſervations, without a reply. I ſaid nothing in the ſumming up that could weaken the force, or diminiſh the effect of them. No doubt, the *baſis* of the verdict was, *his credibility*; but that was left to the jury, and they thought fit to believe him. It is obſervable that the diſcovery of the truth of the tranſaction was intirely accidental. Upon that *Brown* conſents to a compoſition, and to accept leſs than the value of the annuity. Why do that, when there was no clauſe of redemption? There are other ſtrong facts. Why make uſe of Mr. *Waters*'s name, if the tranſaction was fair? Why not appear, as he really was, the principal who was to lend the money? Inſtead of which, he appears only as the ſubſcribing witneſs; makes *Heighway* believe *Waters* is the *principal*, who was an utter ſtranger to the whole affair; and under that pretence, takes *procuration-money* for *lending* his *own* money. If the Court grants a new trial, it muſt be upon the ground, that *Heighway* ought not to be believed. That was a matter proper for the conſideration of the jury: they had all the objections to his credibility before them, and yet were fully ſatisfied of the truth of what he ſaid.

Now the queſtion is, What was the ſubſtance of the tranſaction, and the true intent and meaning of the parties: for they alone are to govern, and not the words uſed. The ſubſtance here, was plainly a *borrowing*, and *lending*. *Heighway* had no idea of ſelling an annuity, but his declared object was to borrow money, and accordingly he depoſited the declaration of truſt which was an ample ſecurity for the ſum he wanted. He goes further, and ſays, "Rather than not have the money he would give twenty or thirty pounds premium for it;" *Brown* tells him, it

it muſt be *by annuity*, that his friend never *lent money* in any other ſhape, and that by that method he might have it for leſs, (viz. 17l. 10s.) As after the firſt quarter he would let him have money to redeem. On the aſſurance that the annuity ſhould be turned into a loan at the end of three months, the treaty proceeds. It comes out that *Brown* advanced the money. That alters the caſe entirely. If *Waters* indeed had been really the principal, this promiſe of *Brown* would have amounted to no more than a promiſe to lend at the end of the three months. But *Brown* himſelf being the principal, the promiſe to *lend* him money to *redeem*, muſt be underſtood to be a promiſe, to *permit* him to redeem. It is true there was a contingency during the three months. It was *that*, which occaſioned the doubt, whether a contingency of three months is ſufficient to take it out of the ſtatute. As to that, the caſes have been looked into; and from them it appears, that if the contingency is ſo ſlight as to be merely an evaſion, it is deemed colourable only, and conſequently not ſufficient to take it out of the ſtatute. Here, the borrower was a *hale* young man, and therefore we are of opinion, there was no ſubſtantial riſk ſo as to take this caſe out of the ſtatute. A new trial refuſed and the verdict for *Richards* confirmed. *Richards* v. *Brown*, *Cowp. Rep.* 770. *May* 1778.

A queſtion aroſe in the following caſe whether an annuity for life made redeemable at the option of the ſeller of it, at the end of five years, would be uſurious.

In 1766, *Robert Harding*, rector of *Grafton Regis*, in *Northamptonſhire*, being then about thirty-two years old, having had the ſmall-pox, and being otherwiſe of a healthy conſtitution, applied to one *Markham* an attorney to procure him the loan of 100l. or upwards, on his perſonal ſecurity; which *Markham* told him he apprehended was impoſſible; but that he might raiſe the money by granting an annuity out of his living; and thereupon *Markham*, at *Harding*'s requeſt, inquired in *London* what the price of ſuch annuity might be, and found it would be only ſix years purchaſe, of which he informed *Harding:* and afterwards applied to the plaintiff, Mrs. *Mary Murray*, to lay out 120l. in the purchaſe of an annuity of 20l. a year for Mrs. *Murray*'s life, and charged on his rectory of *Grafton*; redeemable by him at the end of the firſt five years upon payment of 109l. 10s. this ſhe was at firſt unwilling to do; but, on having it explained to her, ſhe agreed to it: *and there was no communication with her about a loan, in any ſhape whatſoever*,

whatſoever, but merely about the purchaſe of ſuch redeemable annuity, in conſequence of which, *Markham* (as attorney for both parties) drew the writings; whereby *Harding* in conſideration of 120l. grants to Mrs. *Murray* and her aſſigns for ninety-nine years from the 24th of *June* 1766, determinable with the life of *Robert Harding*, a clear annuity of 20l. *per annum*, payable quarterly out of the profits of the rectory of *Grafton Regis*: provided that on payment of 120l. to *Mary Murray* by *Robert Harding* on the 24th of *June* 1771, this grant ſhould be totally void, and ſhe ſhould give him thereout the ſum of 10l. 10s. but in failure of the ſeveral payments till that time, and of the intire ſum of 120l. on the 24th of *June* 1771, ſhould continue in force. *Harding* paid for the writings 7l. and alſo two guineas procuration money to *Markham*, the attorney. The annuity was regularly paid up to *September* 1771; and in Eaſter term 1772, there being then 10l. or (as Mrs. *Murray* ſaid) 15l. in arrear, *Markham* entered up judgment on the bond, and levied 135l. which (then) remained in the ſheriff's hands; *Markham* apprehending (as he afterwards ſet forth by affidavit) that upon levying the execution the judgment would be at an end, otherwiſe he would only have levied for the arrears. On theſe circumſtances, application was made to the Court to ſet aſide the judgment, as being founded on an uſurious contract. On behalf of Mrs. *Murray* it was inſiſted, that the contract was not uſurious, being a fair purchaſe of the annuity at the market price. Even that is not neceſſary: for every one may purchaſe as cheap as he can; and an annuity, exceeding the known proportion, is not uſury; unleſs there be an underhand bargain to repay the money, for then it is merely colourable to hide an uſurious loan. The true rule is, that when the principal is *bona fide* in hazard it is no uſury. It has been carried farther; if there be a *bona fide* purchaſe, without hazard, the Court would not conſider the cheapneſs or dearneſs of the bargain; (1 *And.* 121 *Cro. Eliz.* 27. *Tanfield* and *Finch*, *Fountain* and *Grimes*, *Cro. Jac.* 252) if a man gives 300l. for an annuity of 50l. for one hundred years certain, it is not uſury, 4 *Leon.* 208. Where the books have ſaid, there muſt be no communication about a loan, they muſt be underſtood, that the annuity ſhall not be a cloak for a loan: for if a man, being aſked to lend money, anſwers "No; but I'll buy an annuity," this alone cannot turn it into uſury. And though the deed, on the face of it, ſeemed to import ſomewhat of a loan in the recital, yet it was in this and many other reſpects unſkilfully drawn; and it hath been held that the miſtake

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of a ſcrivener, which makes a contract uſurious on the face of it, ſhall not vitiate the contract, if the intent of the party was otherwiſe. And as to the clauſe of redemption, that is merely for the benefit of *Harding* the vender, it never being in the power of *Murray* to take back her principal again without his concurrence.

On the part of *Harding* it was argued, that this contract is plainly a diſguiſed loan. The recital expreſsly ſtates it ſo, the truth having unawares eſcaped. That the clauſe of redemption makes it no purchaſe, but a mortgage: and that every mortgage is a loan. The deeds were paid for by *Harding*. This ſhews it no purchaſe but a loan. The common uſage is that venders do not pay for the conveyance, but that borrowers do. In *Lawley* and *Hooper*, Lord *Hardwicke* declared his opinion, that theſe purchaſes of annuities were in general only concealed loans. Uſurious contracts are declared by ſtatute 12 *Ann. ſt.* 2. c. 16. ſect. 1. to be where one takes back his principal and more than legal intereſt. By the bond Mrs. *Murray* has power to do this, and has actually done it by levying 135l. viz. ſhe has taken back the whole principal of 120l. for which ſhe has alſo received 20l. *per annum* (that is above 16 *per cent.*) for ſeveral years. After full conſideration the judges delivered their opinions.

De Grey, Chief Juſtice. It is eſſential to the nature of an uſurious contract, that there muſt be, 1. a loan. 2. that illegal intereſt is to be paid for ſuch loan.

It is eſſential to the nature of a loan, that the thing borrowed is at all events to be reſtored. If that be *bona fide* put in hazard, it is no loan but a contract of another kind. So alſo, if illegal intereſt is to be certainly paid, or even upon a reaſonable poſſibility, the contract is uſurious.

To evade theſe principles many expedients have been tried, 1. To make the intereſt precarious and uncertain; but if it be clearly a loan, the poſſibility of the intereſt becoming precarious will not ſignify. (*Roberts* and *Tremayn.*)

Another way to evade them has been to make the principal itſelf precarious. Here the queſtion muſt always be, whether it is a fair *bona fide* hazard. If it be not a fair, but a colourable hazard, the contract will be uſurious. And we may obſerve, that as on the one hand no colour or ſhift will protect a real uſurious loan, ſo on the other, no inequality of price will condemn a fair and real hazard. To illuſtrate the former part of this rule there are many caſes. *Maſon* and *Abdy*, where the chance was that a young man, in perfect health, did not live ſix months, the hazard was colourable, and the loan uſurious. Of the like nature are *Button*

and *Downham*, and *Clayton*'s caſe. To the other branch of the rule (inequality of price) may be applied *the king* and *Drury*. *Dodridge* juſtice, in *Roberts* and *Tremayn*, lays down two rules to judge of an uſurious contract. 1. If a caſualty goes to intereſt only and not principal, it is uſury; for in all events the principal is ſecure, but if both are in hazard, it is not uſury. 2. If both principal and intereſt are ſecured, if it be at the will of the party who is to pay it, it is not uſury. As if one lends 100*l.* to receive 130*l.* at the end of two years, or only 100*l.* at the end of one year, at the option of the borrower. In Lord *Cheſterfield*'s caſe (poſt) theſe rules are adopted and relied upon by Lord *Hardwicke* and Mr. Juſtice *Burnett*.

3. Communication concerning a loan has ſometimes infected the caſe, and turned a contract into uſury. But then the communication muſt be *mutual*. Application, for a loan, is not ſuch a caſe; provided the party applied to refuſes a loan, but treats for an annuity. And this more eſpecially where the party applied to is an attorney, and the real ſeller is ignorant of the whole converſation. I know no caſe where even a meditated loan has been *bona fide* converted into a purchaſe, and afterwards held to be uſurious. To be ſure it is a very ſtrong and ſuſpicious circumſtance. But if the purchaſe comes out to be clearly a *bona fide* purchaſe, it will notwithſtanding be good.

4. Inequality of price is alſo a ſuſpicious circumſtance, eſpecially if very inadequate. But this of itſelf will not make any contract uſurious, though it may upon circumſtances make it unfair, and unconſcientious, and as ſuch relievable in equity.

5. If a power of redemption be given, though only to one ſide, it is a ſtrong circumſtance to ſhew it a loan as in the caſe of *Lawley* and *Hooper*; but that alone will not be concluſive.

6. Another circumſtance is the form of the inſtrument. If that imports a loan, and it was ſo meant, the contract may become uſurious. At the ſame time if the tranſaction be *bona fide*; the blunder of an agent ſhall not make it otherwiſe. *Buckley* againſt *Guildbank*.

7. Subſequent acts of the parties may alſo be a material evidence of intention, unleſs properly cleared up and explained.

In the preſent caſe the principal is precarious, and ſecured only by the life of a clergyman, and his continuing to be beneficed. The communication concerning the loan, was only an application *ex parte* to an attorney who refuſed it, the

the principal party being totally a ſtranger to it. The price comes out to be a fair market price for the annuity, or at leaſt to be very little under it. The clauſe of redemption is entirely at the opinion of the ſeller, and affords him an opportunity of purchaſing back the annuity, at a price ſomewhat leſs than he took for it, in caſe at the end of five years he finds by his conſtitution, &c. he has made a diſadvantageous bargain. The inaccuracy or unſkilfulneſs that appear in drawing this inſtrument ſhall not vitiate a contract, that otherwiſe ſeems to be a fair one. And the act of the attorney in levying ſo large a ſum in execution is accounted for, by his expreſsly ſwearing, that he thought he could have no other remedy for future arrears, after the execution had been once executed. Upon the whole therefore, I cannot conſider this in the light of an uſurious contract. The other judges concurred.

Whereupon the Court ordered, that the arrears now due ſhould be deducted from the ſum levied by the ſheriff, and that the remainder ſhould be returned to the defendant. And that the judgment ſhould ſtand as a ſecurity for any future arrears. *Murray* v. *Harding*. 2 *Blackſtone's Reports*. 859. 1773.

The loan of money produced by the ſale of ſtock, on an agreement, that the borrower ſhall replace this ſtock on a certain day or repay the money on a ſubſequent day, with ſuch intereſt in the mean time as the ſtock itſelf would have produced, is not uſurious, though the intereſt exceed 5 *per cent.* unleſs the tranſaction be colourable and a mere device to obtain more than legal intereſt.

Thus *Wellings*, the defendant, being in want of money, borrowed of one *T. Wellings*, ſince deceaſed, the ſum of 912*l.* 12*s.* 6*d.* on the 1ſt of September, 1784—*T. Wellings* told him, that in order to procure the money he muſt ſell ſtock, and that he expected to receive the ſame intereſt which he received in the ſhort annuities, namely 8½ *per cent.* which being aſſented to, it was agreed that the money ſhould be raiſed by a ſale of ſhort annuities to the amount of 912*l.* 12*s.* 6*d.* which the defendant *Wellings* entered into a bond to replace in the ſame ſtock by the 1ſt of *September*, 1785, and to pay ſuch intereſt thereon as the ſtock would have produced, viz. 8½ *per cent. but that if this money were not replaced by that time*, Wellings, *the defendant, was then to repay that ſum on the 1ſt of* January, 1786, *with ſuch intereſt as the ſtock itſelf would have produced.*

After this *T. Wellings* died and left *Ann Wellings* and *Tate*, the preſent plaintiff, his executors. The ſum borrowed being neither replaced in ſtock before the 1ſt of *September*, 1785, nor repayed before 1ſt of *January*, 1786, the executors threatened to put the bond in ſuit againſt *Wellings*, but at his ſolicitation they agreed to take another bond of him for the money due, including the intereſt which had accrued under the firſt.

Anne Wellings died, and *Tate*, the preſent plaintiff and ſurviving executor now ſued *Wellings* on the latter bond, and *Wellings* in his defence pleaded the ſtatute of uſury. It appeared that there was no actual transfer of the ſhort annuities to the defendant *Wellings* himſelf; but the ſtock was really ſold to ſome other perſon, and *Wellings* received the produce of it the ſame day. Lord *Kenyon*, who tried the cauſe, left it to the jury, to conſider whether this was intended as a *bona fide* loan of ſtock, to be replaced at a ſubſequent time, or repaid in money, or whether it was intended to be a loan of money, and the preſent device a mere colour for reſerving more than legal intereſt; the jury found that it was a fair and honeſt tranſaction, a mere loan of ſtock, and gave the plaintiff, *Tate*, a verdict.

Application was made to the Court of *King's Bench* to ſet aſide this verdict, and to grant a new trial, on the ground of uſury.

In behalf of *Tate*, the executor of *T. Wellings*, and in ſupport of the verdict it was argued, firſt, that whatever might have been the original tranſaction between the parties, the uſury was merged by the cancelling of the firſt bond, and the execution of the ſecond, on which this action was brought. Secondly, even ſuppoſing that the conſideration of the firſt bond could be now enquired into, it is ſufficient to ſay, that the jury have expreſsly found by their verdict that this was a fair transfer of ſtock, and not a loan of money, and have thereby negatived the uſury; as it cannot be denied that ſuch a tranſaction, if *bona fide*, is legal, reſerving the intereſt of the ſtock, although it exceeds 5 *per cent*. *Wellings*, the defendant, had it in his power to get rid of the burden by replacing the ſtock any time before *September*, 1785. During that interval, *T. Wellings*, the teſtator, run the riſk of the fall of the ſtock; and had the ſtock fallen, *Wellings*, the defendant, would have been a gainer by replacing the ſtock at ſo much leſs than he had received. And the teſtator himſelf was only to receive what he would have received in caſe he had not ſold out his ſtock. The only ground, on which it can be contended that this agreement

ment cannot be ſupported, is, that though it be fair on the face of it, it was a mere cover for uſury; but that the jury have negatived.

On the other ſide, for a new trial, it was contended that if the conſideration for the firſt bond were uſurious, and that bond were the conſideration of the ſecond, it cannot be pretended but the ſecond bond is alſo void. And that brings it to the principal queſtion, whether the conſideration for the firſt bond was or was not uſurious. Now although a contract for the loan of ſtock, to be replaced in ſtock *at all events*, be legal, yet a contract for the loan of ſtock to be replaced on a given day, *or to be repaid in money at a ſubſequent day*, reſerving a greater intereſt than the law allows in other caſes, is clearly uſurious and illegal. For after that given day the lender does not run any riſk in the fluctuation of the ſtocks, and it then becomes a bare loan of money with a reſervation of uſurious intereſt. In *Roberts* v. *Tremayne*, it was held that, unleſs the principal be hazarded, no exceſs of intereſt above the legal allowance can be taken on any condition. Now here the principal was not in hazard after the firſt of *September*, 1785; and yet after that time more than legal intereſt was reſerved. If on this tranſaction an action had been brought againſt the teſtator for uſury, in taking more than legal intereſt from *September* 1785 to *January* 1786, a verdict muſt have been given againſt him on theſe facts; and the ſame queſtion ariſes on this plea. Beſides it might be contended, that there was no loan of ſtock at all to *Wellings*, the defendant, the transfer having been made to another perſon. And the only loan between theſe parties being of money.

Lord Kenyon, Chief Juſtice. It has been argued by *Tate*'s council, that we are precluded from conſidering whether or not the firſt contract were uſurious, becauſe, admitting it to be ſo, it was merged in the ſecond bond. But as the former bond was the conſideration of this, on which the preſent action is founded, if that were void as being given for an uſurious conſideration, moſt undoubtedly this ſecond bond would be alſo void. The principal queſtion therefore ſeems to be, whether the original tranſaction were or were not uſurious. With reſpect to one part of the argument, that there was no loan of ſtock to *Wellings*, the defendant, there is no doubt whatever. It is true, that there was no actual transfer of ſtock to *Wellings in fact*, though there was *in ſubſtance*. For it appeared by the evidence that the ſtock was ſold on the firſt of *September*, and that the produce was paid to *Wellings* himſelf on the ſame day. The transfer of the ſtock

ſtock itſelf was never in the contemplation of the parties, and would not have anſwered the end propoſed; but it muſt be virtually conſidered as a loan of ſtock. Now it is admitted that a mere loan of ſtock is not uſurious, nor the payment of the dividends in the mean time, though they exceed the legal rate of intereſt. In this caſe it is clear, that the loan was originally a loan of ſtock during the firſt year, becauſe the party borrowing had it in his power to replace the ſtock itſelf, if he had choſen, during that period, therefore there was nothing illegal in the tranſaction. But I have had ſome doubt in my mind in the courſe of the argument, whether, as *Wellings*, the defendant, had no power to replace the ſtock after the expiration of the year, it did not become a loan of money from the time with a reſervation of uſurious intereſt, and the pretence of transferring the ſtock was merely a colour for the uſurious tranſaction. But my doubt is now removed, for this caſe ought not to have a colour imputed to it, which is expreſsly negatived by the jury. If then this tranſaction were legal during the firſt year, is any thing ſuperadded to make it uſurious? I think not. The whole appears to have been a fair tranſaction, and therefore the verdict ought to ſtand. The other judges concurred. *Tate* v. *Wellings*, 3. *Durnford* and *Eaſt's Reports*, 531. 1779.

By Limitation of the Time of Repayment.

ANOTHER and perhaps more ſucceſsful mode of evading the ſtatute has been by limiting the time of repayment of the principal ſum lent, with an agreement that if it be not paid on the day fixed, then the borrower ſhall pay double the ſum; this it has been decided is not uſury within the ſtatute, becauſe it is in the power of the borrower to diſcharge himſelf, by repaying the principal according to the bargain. 1 *Hawk.* P. C. ch. 82. ſec. 19. There can, however, be no doubt, that if the lender advanced the money with a certainty of not being repaid at the time, either by agreement that it ſhould not be repaid, or by any other means, that then it would be uſury within the ſtatute, or it would come under the deſcription of an unconſcionable tranſaction, which would be reſcinded by a Court of equity, of which we ſhall ſpeak hereafter.

By

By Reſervation of illegal Intereſt in the Form of Houſe Rent.

THIS attempt has been made as follows: *Sanderſon* by agreement lends *Hayns* 1000l. and lets him a houſe of the value of 20l. a year, for which *Hayns* agrees to pay him ſo much as will amount to beyond the legal intereſt of the money lent, and the real value of the houſe rent. This was adjudged uſurious; and one *Bedo* proſecuted *Sanderſon* for the corrupt agreement, and obtained a verdict for 3000l. being triple the value of the ſum lent. 1 *Hawk. P. C.* 82. ſ. 22.

By two ſeparate Inſtruments.

AS where the principal money lent is ſecured by one inſtrument of writing, and the uſurious intereſt by another; but this alſo is held to be uſury, for all writings whatſoever for the ſtrengthening ſuch contracts are void. Ib. ſec. 21.

By the Forfeiture of a Bond.

THIS mode of evading the ſtatute has been attempted thus—a money-lender takes the borrower's bond for 500l. payable at ſuch a time, under penalty of 1000l. the bond is not paid at the time; and then the money-lender takes another bond for the 1000l. payable, with intereſt on the 1000l. This is uſury, for if ſuch a practice were allowed, nothing could be more eaſy than to elude the ſtatute. 3 *Keble*, 142. Neither Courts of law or equity now allow the penalty on the forfeiture of a bond to exceed the principal intereſt and coſts.

By the Secrecy of the Tranſaction.

THIS, though not properly an evaſion of the ſtatute, is an attempt to evade the operation of it, by preventing the production of ſuch evidence as is neceſſary to prove an uſurious tranſaction in a Court of juſtice. Thus for inſtance, if a man borrow money for which he is to pay uſurious intereſt, and the tranſaction is only known to the borrower and lender, there the borrower will not be ſuffered to give evidence of the uſurious tranſaction, becauſe by ſuch means a man would avoid his own act and deed, and conſequently the

the intereſt he has in invalidating the ſecurity he has given, is an objection to his competency as a witneſs.

This objection, however, may be removed by the borrower's repaying the money borrowed, for there is no remedy for him to recover the money back again, and therefore in ſuch caſe his teſtimony is received: but then a queſtion has been raiſed, whether he himſelf will be admitted to prove that he has repaid the money; and it was decided in the following caſe that he might.

Benjamin Abrahams had borrowed money from *Bunn*, a pawn-broker, for which he pledged ſeveral jewels with him. On the money being paid the jewels were returned, but *Bunn* took uſurious intereſt for the loan. The plaintiff being informed of this, brought an action for the uſury againſt *Bunn:* and as there was no perſon who could prove the tranſaction but *Benjamin Abrahams*, the borrower of the money, it was objected that he could not be a *competent* witneſs, unleſs the *repayment* of the money was proved; and that he himſelf was not competent to prove the repayment of it.

Lord *Mansfield*. Two reaſons have been given for univerſally rejecting the teſtimony of the borrower; 1. Becauſe it is to be preſumed really his own cauſe, and that the nominal plaintiff is ſet up colourably by him; 2. Becauſe it would enable him to avoid his own ſecurities, and diſcharge himſelf of the money borrowed.

The firſt reaſon is *now* totally *exploded:* for, he is not *now* preſumed to be the plaintiff in the cauſe.

As to the ſecond, the propoſition laid down is too large. For, there may be uſury which cannot affect the debt, or avoid the contract. The clauſe that avoids the contract, is where the contract is for more than 5l. *per cent.* But if the contract be for only 5l. *per cent.* and the lender afterwards takes more, he is liable to be proſecuted for uſury, and to pay the penalty, though it does not avoid the contract. And where it would affect the debt, it may have been paid.

All the other caſes are looſe notes of *ſayings*, or opinions at *niſi prius;* general aſſertions, general inferences, without particulars, without arguments, without conſideration, without any ſtate of pleadings or facts.

This queſtion having now come before the Court, it is neceſſary to conſider it with accuracy and preciſion.

The objection to the competence of the witneſs can only be ſupported by arguing, either "that the event of this penal proſecution in favour of the plaintiff will *avoid* the bond

bond assurance or contract of the witness, and discharge him from the debt;" or, "that this cause turns upon the *same* points and transactions which, if proved in *another* cause, would avoid the same."

The foundation fails in both propositions: and the consequence would not follow in the last, if the premises were true.

No contract or assurance appears here, for usury; or so much as to repay the money. And if there was, the recovery of the penalty upon this information would not affect the contract. The judgment of this action could not be given in evidence in an action for the debt; though the validity of the contract depended upon the same grounds as the information. That might indeed be a prejudice, influence or bias upon the mind of the witness, and go to his *credit*; but not an actual interest, to go to his *competence*.

This distinction has not been sufficiently attended to, at *nisi prius*: the cases are contradictory; and it is impossible to reconcile them.

The great deference to Lord Chief Justice *Holt*'s opinion made the case of *The King* against *Whiting*, to be followed for some time; nay, Lord *Hardwicke* implicitly followed it in that of *The King* against *Nunez*.

At that time there were many cases both ways; a string of both sorts; (and among the rest *Watt*'s case, "that in forgery, perjury, or usury, the party grieved shall not be admitted as a witness, because he may receive a consequential advantage from the verdict;" and *Parris*'s case, *Ventr.* 49, where such a witness was admitted:) none of these cases were considered or looked into.

But since the case of *Whiting* and the case of *Nunez*, there has been great light thrown upon the distinction between *interest*, which affects the *competence* of a witness; and *influence*, which goes only to his credit. There have been the arguments and judgments in the case of *Rex* against *Bray*, mayor of *Tintagal*, where Lord *Hardwicke* shook the authority of *Rex* against *Whiting*; which he there, in effect, contradicts, (though with guarded decency of expression) notwithstanding his having before followed it, in the case of *Nunez*.

Then came the case of *The East India Company* against *Goslen*. There was also a case of *Bailie* against *Wilon*, (about the proof of a will,) before the delegates: who were *equally divided*, "Whether the objection should go to the *competence* or *credit* of the only witness who proved a codicil subsequent to a second will, *setting up again* the first will;" and therefore no sentence was given. Thereupon a commission of

adjuncts

adjuncts iſſued: a majority of whom (Mr. Juſtice *Denyſon* being one) held "that it went only to the *credit*:" and ſentence was given for the firſt will. Upon a petition for a commiſſion to review, it was fully argued: and Lord *Hardwicke*, on the 15th of *January*, 1744, gave a ſolid opinion with the majority of the adjuncts, "That the witneſs having adminiſtered under the firſt will as agent to the executor, or as executor *de ſon tort*, and being liable to actions, the objection went only to the *credit*, not to the competency."

The ſolemn diſcuſſion of theſe three caſes drew the line between *intereſt*, which goes to competence; and *influence*, which goes to the credit, more clearly than had been before underſtood.

It eſtabliſhed a rule, "that where the matter was *doubtful*, the objection ſhould go to the *credit*."

It eſtabliſhed, "that the queſtion in a criminal proſecution being the ſame with a civil cauſe, in which the witneſs was intereſted, went *generally* to the credit; unleſs the judgment in the proſecution, where he was a witneſs, could be given in evidence in the cauſe where he was intereſted." I ſay "*generally*;" (becauſe all rules of evidence admit of exceptions.)

After theſe caſes in that of *Rex* againſt *Broughton* in 1745, Lord Chief Juſtice *Lee* over-ruled the three caſes of *Rex* againſt *Whiting*, *Rex* againſt *Nunez*, and *Rex* againſt *Ellis*: which opinion of his has been followed ſince, and approved.

There has been a remarkable caſe ſince I left the bar, in *Trinity* Term 32 and 33 *G.* 2. *Bartlett* againſt *Pickerſgill*. The defendant bought an eſtate for the plaintiff: there was no writing, nor was any part of the money paid by the plaintiff. The defendant articled in his own name, and refuſed to convey; and by his anſwer denied any truſt. Parol evidence was rejected, and the bill diſmiſſed. The defendant afterwards was indicted for perjury; tried at York, and convicted upon the evidence of the plaintiff, confirmed by circumſtances and the defendant's declarations. The plaintiff then petitioned for a ſupplemental bill in nature of a bill of review; ſtating this conviction: but the petition was diſmiſſed, becauſe the conviction was not evidence, 22d *November*, 1762.

This reaſoning ſhews too, that, if it was neceſſary, the witneſs was competent to be heard, as to the debt being paid: the recovery could not be evidence. What he ſwore could not be evidence in an action for the debt.

There

There is no danger of perjury, from hearing him. The defendant *Bunn* may produce the ſecurity, and falſify him. If (as here) it is the caſe of a pawn, the witneſs would ſwear againſt his own intereſt to ſwear untruly. "The debt was paid, and the pledge returned." But, either way, the debt is paid: for, unleſs the pledge be redeemed, it is a ſatisfaction.

Suppoſe a witneſs produces a bond, or note, or mortgage cancelled. Suppoſe he produced a receipt. There can be no danger in hearing him: for the jury are not bound to believe him. That depends upon circumſtances, which may contradict or ſupport his teſtimony.

But if it be neceſſary to prove payment, and the party is not to be heard as a witneſs to prove ſuch payment, the ſtatute would be as effectually repealed as if the borrower could never be a witneſs at all: for, they never would ſuffer any body elſe to be privy to the payment, delivering up, or cancelling the ſecurities. Under all circumſtances of this caſe *Benjamin Abrahams* is a competent witneſs. *Abrahams* v. *Bunn*, 4 *Burrow's Reports*, 2251. 1768.

By giving a Borrower bad Bills.

THIS like the laſt is not an evaſion of the ſtatute but is a mode of impoſition in tranſactions of this ſort, that ought to be noticed. An impoſition of this kind is in general the fault of the borrower, but there are caſes in which he may be deceived by the receipt of bills, which bear every appearance of being good. For inſtance, if a bill be originally founded on an uſurious conſideration it is void: now though it be accepted by a reſponſible perſon, by which it has credit to be put in a ſtate of negociation: yet in whoſever hands this bill goes, even if in an indorſer's hands who was ignorant of the uſurious tranſaction, and who has given full and valuable conſideration for it, yet it is void and the acceptor of the bill is not bound to pay it, and the innocent indorſee or holder of the note has no remedy but againſt the perſon from whom he received it. In deciding on a caſe of this kind (*Lowe* v. *Waller*, 2 *Douglaſs Rep.*) Lord *Mansfield* ſaid, "We have conſidered the caſe very attentively, and I own with a great leaning and wiſh on my part, that the law ſhould turn out in favour of *Lowe* (the innocent indorſee), but the words of the act are too ſtrong. Beſides we cannot get over the caſe on the ſtatute againſt *gaming*, which ſtands on the ſame ground.

This

This is one of thoſe inſtances in which private muſt give way to public convenience. It is leſs miſchievous, that the law ſhould be as it is in reſpect to bills and notes, than other ſecurities; becauſe they are generally payable in a ſhort time, ſo that the indorſee has an early opportunity of recurring to the indorſer, if he cannot recover upon the bill:" and judgment was given againſt the holder of the bill.

The caſe on the ſtatute againſt *gaming*, alluded to by Lord *Mansfield*, as ſtanding on the ſame ground as the above; was as follows:

John Church advanced money to *Bampton*, knowing it to be for the purpoſe of gaming with: *Bampton* gave *Church* his notes for this money, and *Church* indorſed them over to the plaintiff *Bowyer*, for a full and valuable conſideration. *Bowyer* himſelf was intirely ignorant that the money had been lent for the purpoſe of gaming and he now brought this action on the note againſt *Bampton* the drawer to recover the money.

Upon this a queſtion aroſe upon the ſtatute 9 *Anne*, c. 14. ſect. 1. which ſays, "That all notes, where the whole or any part of the conſideration is money *knowingly* lent for gaming, ſhall be void to all intents and purpoſes whatſoever," whether the plaintiff could maintain this action againſt the defendant. And after two arguments the Court were of opinion he could not; for it is making it of ſome uſe to the lender, if he can pay his own debts with it: and it will be a means to evade the act, it being ſo very difficult to prove notice on an indorſee. And though it will be ſome inconvenience to an innocent man, yet that will not be a balance to thoſe on the other ſide. And the plaintiff is not without remedy, for he may ſue *Church* on his indorſement. *Bowyer* againſt *Bampton*, *K. B.* 2 *Strange*'s *Reports*, 1155.

It appears therefore that the innocent indorſee of a gaming note can maintain no action for the money againſt the drawer, and conſequently the ſame advantage may be taken, as in the inſtance of an uſurious note. It is however obſervable that the aſſignee of a bond for valuable conſideration, is not in the ſame predicament as the indorſee of a note, on the ground of uſury, &c. there ſeems to be an inconſiſtency of principle therefore, not ſufficiently excuſed by the obſervation of Lord *Mansfield* abovementioned, viz. "It is leſs miſchievous that the law ſhould be as it is in reſpect to bills and notes than other ſecurities, becauſe they are generally payable in a ſhort time, ſo that the indorſee has

has an early opportunity of recurring to the indorſer." The caſe reſpecting the aſſignee of a bond was as follows:

Warnes was indebted to *Alder* upon an uſurious contract on a bond, and *Alder* being indebted to *Ellis* transferred the debt to *Ellis*, and *Warnes* became bound for the ſame uſurious debt to *Ellis*, whoſe debt was juſt and he ignorant of the uſury. *Ellis* ſues *Warnes* on this bond, who pleads the uſurious contract between him and *Alder*: and the queſtion was whether *Ellis* could recover?

The Court held that he could, and ſaid as it was aſſigned to him for a juſt and true debt, and he not privy to any corrupt agreement between *Alder* and *Warnes*; it is not reaſonable he ſhould be delayed of his debt: for as on the one ſide, it may be ſaid to be the means to defraud the ſtatute; ſo on the other ſide, it may be greater miſchief to a true creditor, when he ſhall take ſecurity by bond, with ſureties for his money, if it ſhould be examined whether there were any corrupt agreement between his creditor, and his ſureties, of which it cannot be preſumed he has any knowledge; and it would be a means to draw in queſtion every debt, and to puniſh one who is not privy to any corrupt agreement. It was thereon adjudged for the plaintiff *Ellis*. *Ellis* v. *Warnes*, *Crok. Jac.* 33. 1603.

HAVING ſaid thus much with reſpect to tranſactions of an uſurious nature, and which as ſuch come under the correction of the act of parliament; we will now proceed to thoſe tranſactions which although in point of law are not uſurious, are yet attended with ſuch circumſtances of unconſcionable impoſition and oppreſſion, and of undue advantage of neceſſity and diſtreſs, that a Court of equity will interfere and relieve the party impoſed on.

By the preceding pages we may obſerve the care of the legiſlature in fixing certain limits to the profits of the money-lender, and the ſolicitude of our courts of juſtice, in preventing every attempt to go beyond them. It was however impoſſible that the legiſlature could guard againſt impoſition in the numberleſs caſes in which opportunities of practiſing it occur. The eſtabliſhment of intereſt at five *per cent.* can only be proper or juſt, in thoſe caſes where the lender is in no hazard of loſing his principal: but when that hazard exiſts, the profits to the lender muſt vary in proportion to ſuch hazard: every caſe furniſhes new circumſtances: and as no poſitive ſyſtem of law could be made to regulate the terms of every bargain; our legal conſtitution has given to the Court of Chancery, a juriſdiction over theſe caſes which the ſtatute of uſury does not affect,

and

and which afford the beſt opportunities to impoſition and extortion to prey on the neceſſities, diſtreſſes, and incaution of men.

Of unconſcionable Bargains with Heirs.

THE firſt inſtances of this ſpecies of impoſition are thoſe, in which young heirs in expectation of fortunes on the death of their anceſtors, have been induced, in order to ſupply their preſent neceſſities or extravagancies, to borrow money, and to enter into contracts to pay the ſame with exorbitant increaſe when they come into the poſſeſſion of their fortunes. As the money-lender in ſuch caſes is to loſe the money lent in caſe of the death of the heir before the contingency happens, which gives him the power of repayment, the ſtatute of uſury cannot therefore affect a bargain of this nature, except under circumſtances mentioned before; for five *per cent.* would by no means be an adequate compenſation for the riſque the lender runs. The terms of the contract therefore are left free and open to the parties, ſubject however to the juriſdiction of the Court of Chancery, which has a power of reſcinding ſuch contracts wherever there are any circumſtances of unconſcionable impoſition or extortion.

All the caſes on this ſubject are governed by their own particular circumſtances, and therefore they afford but few general principles by which we may be enabled to decide with certainty on caſes of a ſimilar nature; the moſt convenient mode therefore for the compiler, and perhaps the beſt for the reader, is merely to ſtate ſome caſes on the ſubject, leaving it to himſelf to extract principles where they are to be found, or to judge by analogy where they are not to be found.

An heir is always favoured by the law, and there ſeems a greater latitude of relief adopted by Courts of equity towards an heir, than towards others in caſes of impoſition; in general all unconſcionable bargains with heirs during their anceſtors lives, will be ſet aſide by a Court of Chancery.

Nott was entitled after the death of his father Sir *Thomas Nott*, to a houſe at *Richmond* in *Surry*, which, if in poſſeſſion was worth about 800l. but being caſt off by his father, and deſtitute of all means of livelihood, he treated with *Hill*, and for 30l. paid him in money, and 20l. a year ſecured to him

him during the joint lives of him and his father, he conveyed abſolutely to *Hill* all his title to the houſe.

Nott's father lived ten years after this bargain, when *Nott* applied to the Court of Chancery to be relieved againſt his conveyance of this houſe.

Lord Chancellor *Jefferies* ſaid, that *Hill*'s purchaſe was an unrighteous bargain, and decreed that *Nott* might redeem it. *Nott* v. *Hill*, *Vernon's Reports*, 167. 1683.

Berney being a young man, and in expectation of a great eſtate, in caſe he ſurvived his father, and being confined to a very narrow allowance, he borrowed of *Pitt* 2000l. for which he bound himſelf to pay 5000l. within a month after his father's death, but in caſe he did not ſurvive his father no money was to be paid, and *Pitt* was to loſe his 2000l. *Berney*'s father died in *January* 1679, and he then applied to the Court of Chancery to be relieved from the payment of the 5000l. on payment of 2000l. and intereſt, and this application he founded on the advantage taken of his diſtreſſes by *Pitt*.

In behalf of *Pitt* it was argued, that as he run the riſk of loſing his 2000l. altogether, by the father's dying before the ſon; and that as the money was really and *bona fide* lent, and not in wares, to be ſold at an under value; he was entitled to the 5000l.

On the other hand it was argued that this was an unconſcionable bargain, and that in ſuch caſe there was no true difference between the loan of *money* or *wares*, and that the expreſſing that *Pitt* was to loſe his whole money in caſe the father ſurvived the ſon, was uſeleſs, becauſe had that happened the money would of courſe have been loſt, and the expreſſing it made the bargain worſe, as being done to colour a bargain which to *Pitt* himſelf appeared unconſcionable.

Lord Chancellor *Jefferies* decreed in favour of *Berney* merely in reſpect of the unconſcionableneſs of the bargain, and that he ſhould pay only the 2000l. and intereſt.

It appears from the regiſter's book that there were two hearings in the above cauſe, the firſt before Lord *Nottingham*, who did not relieve, the conſequence of which was that *Berney* had been conſtrained to pay *Pitt* 5390l. but on a rehearing before Lord *Jeffries* he diſcharged Lord *Nottingham*'s decree, and ordered *Pitt* to refund all he had received beyond the 2000l. originally lent and the intereſt, and alſo with intereſt from the time *Pitt* received it. *Berney* v. *Pitt*, 2 *Vernon's Reports*, 14. 1686.

Price being an exchange-man for many years had practiſed upon young heirs, by ſelling them goods at extravagant values, and to be paid *five* for *one*, and more upon the death of their fathers, and had in that manner obtained from Mr. *Bill* and two other young gentlemen, that were heirs to good eſtates, ſeveral ſecurities, wherein they were bound ſeverally and jointly in 4000l. for payment of great ſums of money.

Bill applied to Chancery for relief, and the Court decreed his ſecurity to be delivered up on payment of what *Price* really and *bona fide* paid to him alone, and for his own proper uſe. *Bill* v. *Price*, 1 *Vernon's Reports*, 467. 1687.

Twiſleton having married a wife with a ſmall portion, thereby incurred his father's diſpleaſure, but upon the wife's father advancing 500l. for her portion, his father made a proportionable ſettlement, and received the ſon and his wife into his houſe.

Afterwards, one *Griffith*, who had been an attorney, (but had left off practiſing for a conſiderable time) took upon him to adviſe and direct *Twiſleton* in every thing, and profeſſed great friendſhip for him; and after his father was reconciled to him, *Twiſleton* being in debt, was deſirous to ſell to his father the reverſion of an eſtate, which his father held for life, and to which he was entitled in tail if he ſurvived his father. His father propoſed giving him 1000l. for the ſame, *Griffith* the attorney by letter diſſuaded him from it, declaring that this was not enough.

In about a year afterward however, when *Twiſleton's* father was ancient and ſickly, and in very declining life, *Griffith* himſelf bought this reverſion of *Twiſleton* for 1050l. when the eſtate was worth 150l. *per annum*; and *Twiſleton* was at that time thirty-four years of age, and had a child about ten years old, who was inheritable to the intail; *Twiſleton* by *fine* conveyed this reverſion to *Griffith* in fee.

In about two years time *Twiſleton's* father died, and *Twiſleton* now applied to Chancery to ſet aſide this conveyance.

It was argued for *Griffith*, that there was no fraud in obtaining this conveyance; that *Griffith* ran a hazard in loſing his 1050l. in caſe *Twiſleton* had died without iſſue, in the father's life-time; and it appeared, that *Twiſleton* himſelf bought a commiſſion to go into the army; and the child, being about ten years old, was ſubject to many diſeaſes, that might take him off, as the ſmall-pox, &c. and as *Griffith* run the hazard, ſo he ought to have the benefit thereof; that if ſuch a tranſaction as this were liable to

be impeached afterwards in a Court of equity, it would be almoſt impracticable for an heir ever to ſell a reverſion; and that a purchaſe, if fairly made, was not to be ſet aſide merely becauſe it turned out a good bargain.

But Lord Chancellor *Cowper* decreed relief upon payment of principal and intereſt, and full coſts, grounding his opinion, chiefly upon the caſe of *Berney* and *Pitt*; in which Lord Chancellor *Jefferys* declared that theſe bargains were corrupt and fraudulent, and tended to the deſtruction of heirs ſent to town for their education, and to the utter ruin of families; and that the relief of the Court ought to be extended to meet ſuch corrupt bargains and unconſcionable practices.

Lord *Cowper* ſaid, that this like that was the caſe of an heir, and who was the leſs upon his guard with *Griffith*, as he pretended nothing to him but friendſhip, by encouraging him to leave his father's houſe, and diſſuading him from ſelling the reverſion to his father for 1000l. which was but 50l. leſs, and this a year before; that the reaſon inducing the Lord *Jefferys*'s decree, was, probably, to diſcourage a growing practice of devouring an heir, and that decree ſtanding, ſhewed that every one thought the ſame was juſt; and that there was therefore no attempt in parliament to reverſe it.

His Lordſhip added, he ſaw no inconvenience in the objection, that at this rate, an heir without diſtreſs, could not ſell a reverſion; this might force an heir to go home, and ſubmit to his father, or to bite on the bridle, and indure ſome hardſhips, and in the mean time, he might grow wiſer, and be reclaimed.

Wherefore let *Twiſleton* be relieved on payment of principal, intereſt, and full coſts; I mean *liberal* coſts. *Twiſleton* v. *Griffiths*. 1 *Peere Williams' Reports*, 310. 1716.

Sir *John Barnardiſton*, being entitled to eſtates after the death of his uncle, without iſſue male, worth 300l. a year, called *Ratton Magna* and *Ratton Parva*, in *Suffolk*, and being in diſtreſſed circumſtances, conveyed his title to theſe eſtates to *Lingood*, his heirs and aſſigns for ever, for 300l. only: and Sir *John* gave *Lingood* a bond in penalty of 6000l. for the performance of this agreement. After the death of his uncle, he applied to the Court of Chancery to be relieved againſt this bargain, as being unconſcionable and without a proper conſideration.

The Lord Chancellor ſaid, That the parties were not abſolutely ſure whether the eſtate conſiſted of one or two

manors; ſo that Sir *John the nephew* did not know for certain what he had ſold, nor *Lingood* what he purchaſed; and taking it in the faireſt light, the Court ought not to ſanction a bargain made intirely in the dark.

This being the caſe, I cannot think of leaving Sir *John* at *Lingood*'s mercy, to put a judgment of 6000l. in ſuit, which he compelled, or rather drew Sir *John* to give at the time of agreement, as a ſecurity for the performance of it.

I am of opinion, therefore, upon the circumſtances of this caſe, it is juſt in the Court to ſet the thing right for the benefit of all parties: and in the firſt place I muſt relieve Sir *John Barnardiſton*: and for this purpoſe do decree that the bond and judgment ſhall ſtand as a ſecurity only for *Lingood*'s principal, intereſt and coſts, and no farther.

For without doubt, there are all the material ingredients in this caſe, to ſet aſide the agreement as a catching bargain, againſt a neceſſitous and improvident heir.

The very advancing money in ſuch ſmall ſums, as has been done in the preſent caſe, as three guineas, ſix guineas, &c. ſhew Sir *John Barnardiſton* to be in the utmoſt diſtreſs; and as to the hazard that *Lingood* run of it's being a loſing bargain, it is a circumſtance in common only with all perſons who are dealers in this way, and if this had been a reaſon for carrying ſuch an agreement into execution, there never would have been any of them ſet aſide; but what the Court is guided by, in all theſe caſes is, the taking an undue advantage of an heir's being in diſtreſs and neceſſitous circumſtances; and this is the principal ground of theſe decrees.

Here is no more than 300l. given for an eſtate of 300l. a year, which is but one year's purchaſe of a reverſion that was to fall in at the death of a perſon who was turned of fifty, and not likely to marry, ſo that the hazard the contracting party run was very ſmall.

The conveyance is dated on the 6th of *January*, 1730, and the firſt receipt Sir *John* gave, which was for fifteen guineas, was but the *May* before, expreſsly recited to be in part of payment for the reverſion of *Ratton Magna* and *Ratton Parva*, 10l. in another, 61. 6s. in another, and 20l. in another receipt, and ſo on, and all of them recited to be in part of purchaſe-money, and if this had been a fair tranſaction, the Court would have decreed Sir *John* to convey on ſuch receipts.

But

But can this be ſaid to be a fair way of purchaſing eſtates, to furniſh a young heir with money from hand to mouth, and barely enough to buy him neceſſaries in the life-time of his anceſtors.

As to the hazard which the purchaſer run, I have ſaid before that this Court always extended their relief in ſuch caſes, and with the greateſt juſtice in the world, for the ſake of the public, to prevent people, gaming, as it were, to the prejudice and damage of young improvident perſons, and the ruin of families. Sir *John Barnardiſton* v. *Lingood*, 2 *Atkins' Reports*, 133. 1740.

John Spencer, in 1738, being poſſeſſed of an income of 7000l. *per annum*. and of a perſonal eſtate in plate, jewels and furniture, to a great value, and having contracted a debt to the amount of 20,000l. to ſeveral perſons, moſtly tradeſmen, by whom he was preſſed, and which he was deſirous to pay off, propoſed to borrow money and particularly the ſum of 5000l. for that purpoſe. As he had a well-grounded expectation of an increaſe of fortune on the death of his grandmother, the ducheſs of *Marlborough*, if he ſurvived her, he reſolved to contract thereon. He was above thirty; originally of an hale conſtitution, but impaired; and although afterwards he lived more regularly, yet he was addicted to ſeveral habits prejudicial to his health, which he could not leave off. She was ſeventy-eight, of a good conſtitution for her age; and careful of her health. He ſent to market a propoſal, which he ſuppoſed, would eaſily meet with a purchaſer; as it was natural to expect in common courſe, that his grandmother ſhould die firſt, though ſhe was a good old life, and he but a bad young one. The propoſal was that if any body would lend him 5000l. he would oblige himſelf to pay 10,000l. at or ſoon after the death of his grandmother, if he ſurvived her, but to be totally loſt if ſhe ſurvived him: this was rejected by ſeveral knowing perſons as not ſufficiently advantageous; as it was at firſt by Sir *Abraham Janſſen*; but afterwards accepted by him; and a bond of 20,000l. conditioned to pay 10,000l. was given on theſe terms. She lived ſix years and three months; and he ſurvived her one year and eight months. Upon her death, it did not clearly appear, who made the firſt application, whether Sir *Abraham Janſſen* for his money, or *John Spencer* for delay of payment, as he might not be able immediately to raiſe 10,000l. although by the event he came by a great annual eſtate; but it was clear, that as ſoon as it was

propoſed by Sir *Abraham Janſſen* to *John Spencer*, he conſented to do it; and near two months after the contingency happened, he executed a bond in the penalty of 20,000l. conditioned for the abſolute payment of 10,000l. at or before *April* following; and executed alſo a warrant of attorney for confeſſing judgment thereon; which was afterwards entered. *John Spencer* in 1743, at different times paid two ſeveral ſums of 1000l. each in part of this debt; and *expreſſed himſelf ſeveral times ſatisfied* with the conduct of Sir *Abraham Janſſen*; and *that he ſhould be paid his whole demand as ſoon as poſſible.*

John Spencer died, leaving the earl of *Cheſterfield*, among others, one of his executors. Sir *Abraham Janſſen* being about to proceed at law againſt them for the recovery of the remainder of his money, when *Spencer*'s executors applied to the Court of Chancery for an injunction, to prevent their proceeding at law, and alſo to relieve *Spencer*'s eſtate from the bond for 10,000l. on payment of 5000l. the ſum originally lent, with intereſt.

This caſe was argued by counſel, at great length, before the Lord Chancellor *Hardwicke*, Lord Chief Juſtice *Lee*, Sir *John Strange*, Maſter of the Rolls, and Mr. Juſtice *Burnett*, whom the Lord Chancellor called in to his aſſiſtance; and on the 4th of *February* 1750, the Court gave judgment as follows:

Mr. Juſtice *Burnett*. The counſel for the executors in this caſe have principally inſiſted upon three things:

1ſt. That the original contract between *Spencer* and Sir *Abraham* is uſurious, contrary to the ſtatute, as being a greater *premium* than the law allowed, and if ſo the new ſecurity, viz. the bond given by *Spencer* after the death of his grandmother, will fall to the ground as well as the contract itſelf. 2. That, if not uſurious, it is ſo unreaſonable an advantage taken of neceſſity and future expectancy, as the Court is warranted to relieve againſt, as an unconſcionable bargain. 3. That if the Court is warranted to relieve againſt this, the new ſecurity will be conſidered as a continuance of the ſame oppreſſion, and ſtand in the ſame light, though entered into after the event.

The other ſide inſiſt, in behalf of Sir *Abraham*, that the original contract is a mere contingent bargain, and conſequently not within either the intent or words of any ſtatute; there are no circumſtances of a deſtitute heir ſeduced from parental government; no practice, fraud or ſurprize: and that the bargain is equal, taking into conſideration the riſk run of the principal ſum: and therefore the Court is not warranted

warranted to relieve even on the foot of the original bargain. But ſuppoſing the Court would relieve on that, yet there is no precedent (but to the contrary) of relief when the party has taken on himſelf to be a judge of the equity of the contract, and confirms it with his eyes open.

As to the firſt point, whether the loan of 5,000l. to be paid 10,000l. on the death of the ducheſs if he ſurvived her, but nothing if he died before her, is uſurious, or a mere caſual contingent bargain. After ſtating his reaſons at length, for which, (*vide ante* p. 417), he concluded that it was not uſurious: he then proceeded,

The next point is, ſuppoſing it not a contract within the ſtatute of uſury, whether it is not ſuch an unconſcionable bargain obtained on an expectant upon his expectancy, as the Court is warranted on precedents to relieve on paying the ſum advanced with intereſt from the time of advancing? If it was neceſſary to give an opinion upon this, I own I ſhould have great difficulty. On one hand I ſhould apprehend, it would be too large to ſay, in no caſe an heir and expectant could borrow money on his expectancy: and yet to let him borrow without any advantage to the lender ſeems to put him under difficulties; fathers being frequently cloſe-handed, though liberal enough at their death: ſo that an heir, if hindered of ſupporting himſelf by theſe means, might ſtarve in the deſart within view of the land of *Canaan*. On the other hand I ſhould dread the conſequence to give the ſanction of this Court to future bargains. Lord *Cowper* ſtates the inconveniencies of a ſanction, which had been given. I am ſure it is a point of that conſequence to the welfare of mankind, that without neceſſity no Court will give an opinion, of which an ill uſe may be made. For *Spencer*'s executors it is inſiſted, that there have been many contracts, not illegal or iniquitous in ſome circumſtances, but from the univerſal ill tendency on the prejudice to the public have always been ſet aſide in this Court; inſtances of which were in marriage brokage bonds, and other contracts of like nature; and that the ill tendency of heirs contracting with ſtrangers to furniſh their wants, is to make them quit a regular family life and dependency, to withdraw from advice and counſel of friends, and to have youth ſupplied with means of gratifying their paſſions, and the bringing people together on the worſt principle, on which men may contract, avarice on one ſide, and a craving appetite on the other. The greedineſs of gain can be the only principle on which a ſtranger can furniſh a ſtranger; and the occaſion of applying to a ſtranger is, becauſe the wants

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are ſuch as he would not reveal to his family, which tends to a deluſion in what is of general concern, the proviſion for poſterity. A man may be giving his eſtate to a money-lender inſtead of the perſon intended; and every diſguiſing the truth from a man who has a right to the truth, is wrong, and ought not to be encouraged; and by this deluſion he gives his eſtate to ſtrangers, when he thinks he is giving to his heir or relations, and when if he had known the truth he would have provided for that heir or thoſe relations, ſo as to prevent the beggaring himſelf. This has been a growing practice to ſupply young heirs; and the Court has extended its remedy. At firſt the caſes are, where there is expreſs proof of groſs practice or actual impoſition: from thence it went to caſes, where on the face of the contract it was ſo groſs and unreaſonable a contract between the parties, the Court, in preſuming a man would not enter into it but by impoſition, has relieved; of which one caſe among many, *Nott* againſt *Hill*; as the miſchief increaſes the Court has extended its remedy. Where the bargain is ſo lucrative, and the perſon in neceſſity, ſo that the judgment of the Court has been, that neceſſity alone could induce to make that contract, there has been relief; the firſt caſe of which kind is *Berney* againſt *Pitt*, a very remarkable caſe, and a ſtronger there could not be. It is ſtated alſo by Lord *Cowper* in *Twiſleton* v. *Griffith*, 1 *Wil.* 310, where were marks enough of impoſition to warrant relieving on that foot: but he choſe to eſtabliſh it on the general principle and Lord *Jefferys*'s decree, not on the particular circumſtances of the caſe; and he ſeems to rejoice in the conſequence, that this would put a difficulty on an heir to borrow upon his expectancy. The laſt caſe is *Curwyn* againſt *Milner*, 3 *Wil.* 293, where Lord *King* decreed relief; but ſaid, if it was new, he would not have gone ſo far, where ſuch a contract was fair, and done with eyes open; ſaying he thought himſelf bound by precedents, and that he ſaw no difference between an eſtate ſettled on an heir on his father's death, and an expectancy of perſonal eſtate at the death of a relation; it is the ſame kind of expectancy, that tempts to theſe kinds of bargains, and the influence the ſame. On the other hand it is inſiſted, none of the particular caſes cited come within the circumſtances of this: that all thoſe of frauds, practice, or impoſition, are out of the caſe; it being a bargain ſent to market by the borrower, and the terms his own: no deſtitute heir under parental government; having a great perſonal eſtate, and ſo not in the circumſtances of the party ſeeking relief in other caſes; the

the bargain being different, the riſk being different; and the bargain in all its circumſtances, ſo equitable, that if the Court ſhould enter into a nice examination of the proportion and riſk, it would appear, that Sir *Abraham Janſſen* would have been out of pocket if the grandmother had lived a little longer: that this Court will not lay down a principle in general, that an heir or expectant may not contract on his expectancy: that there have been inſtances, where ſuch contracts have been carried into execution, as *Hobſon* againſt *Trevor*, and *Whitfield* againſt *Fauſſet*; that it is a ſufficient terror to ſuch contractors, that they are always liable to the examination of this Court: and that they can never ſtand but upon the reaſonableneſs and juſtice of the contract; which will reſtrain one kind of men from preying upon the follies of another. Theſe are the arguments on both ſides, and there would be danger and difficulty in giving an opinion on either: but there is no neceſſity for it; that being taken away by Mr. *Spencer* himſelf; who has made himſelf the judge, by voluntarily confirming the contract and giving a new ſecurity. Vide poſt.

Sir *John Strange*, Maſter of the Rolls, on the ſame queſtion ſaid, What I ſhall offer, will be grounded entirely on what was done by Mr. *Spencer* after the death of the ducheſs, was I to ſuppoſe for argument's ſake, *Spencer*'s eſtate was entitled to the relief prayed by his executors, I ſhall offer nothing as a determination of that branch of the caſe: though it may not be improper to throw out ſomething in general. I ſee no reaſon to quarrel with the principal caſes cited as the ground for the interpoſition of a Court of equity: on the contrary I cannot help declaring, I concur with thoſe determinations, and do not mean in the leaſt to abate the force of them. In the preſent caſe there are certainly many circumſtances, that caſt a favourable light on Sir *Abraham Janſſen*'s part of the tranſaction. He does not appear to be a perſon having an intent of fraud. The ſcheme moved not from him, but from Mr. *Spencer*; on whoſe own terms the money was advanced without any haggling on the part of Sir *Abraham Janſſen*, after it was refuſed by others as not a deſirable contract on the calculation of chances. Not that the hands of the Court are tied up from relief from the want of fraud and impoſition; I have no jealouſy of any thing of that in this caſe: yet caſes may be, wherein this Court would interpoſe to prevent improvident perſons from ſpending or ruining their eſtates, before they come to them, though no proof of actual fraud or impoſition: which is agreeable to the ſaying of Lord *Jeffery*s

ferys in *Berney* againſt *Pitt*. So was it conſidered in *Twiſleton* againſt *Griffith*, and in *Curwyn* verſus *Milner*. The neceſſity muſt be ſeen by every wiſe and conſiderate perſon. The Courts keep a ſtrict hand over theſe agreements; which indeed muſt ſtand upon their own particular circumſtances; and perhaps it is not adviſeable to lay down any general rule about them, or more than is neceſſary to the relief in each particular caſe.

Lord Chief Juſtice *Lee*. On this ſecond point I think, it will be well worth the conſideration of the Court of equity, whether they will not interpoſe in caſe of theſe hazardous bargains to pay double, ſo as to prevent the lender going away with ſuch an exorbitant gain? It is difficult to form any general rule, ſo as to meet every caſe of this kind, that may happen; but they muſt in general be governed by the circumſtances of each caſe: only this may be always proper to be attained to, as far as may be, to bring all contracts, that are in nature of loans, to that mean preſcribed by parliament, that none take more than the legal intereſt; and by caſes ſtated and quoted in Courts of equity it appears, they have uſed a ſagacious attention to diſcover, whether there is any fraud expreſſed, or from the nature of the tranſaction or perſon concerned, any thing carrying on the face of it an appearance of impoſition; as in the caſe of young heirs, &c. a Court of equity has diſabled from taking adventage thereof, and interpoſed to prevent unconſcionable bargains. That therefore is a matter worth the regard of the Court of equity ſo as to prevent all trade of that ſort, ſuch as is called *Jewiſh* intereſt, which ſeems a *malum* conuſable at common law. What has been done by Mr. *Spencer* after the death of the ducheſs, prevents the Court from entering minutely upon the firſt contract; for any objections thereto are taken away by himſelf in whoſe place the *executors* ſtand. The firſt contract ſurely might recover ſtrength and be invalidated by the intervention of a new caſe, that was fit to create a right. If he was under apprehenſion of his grandmother, when the firſt ſecurity was given, yet they were at an end at the laſt. If he was an infant, when he gave the firſt bond, the contract would be voidable as to him: but if when at full age he gave a new bond, it would be good againſt him. In the caſe in *Dom* 136, called the *Macedonian* decree, it is ſaid, that if any creditor lent money for a juſt and reaſonable cauſe ſufficient to ſupport the equity of the obligation, it was by a favourable interpoſition of the decree of the ſenate excepted from the general prohibition according to the quality of the uſe, to which the money

was put. Sir *Abraham Janſſen* has this exception in his favour; the uſe of the money being to pay juſt debts to tradeſmen; for if theſe contracts are to be ſet aſide upon the hatred of the creditor, who has made an improper loan, yet the imputation is taken away: and even in the caſe of a ſon, if the father approves or ratifies the obligation by paying part, or the ſon acquits it himſelf, it cannot be revoked; *Dom.* 137, 138. But it is ſaid, that though he was not under the ſame difficulty, when he gave this new ſecurity, as at the giving the firſt bond, yet he was a debtor then to Sir *Abraham Janſſen*, and liable to be called on by legal proceedings: but that cannot be a reaſon to ſet aſide this deliberate act of Mr. *Spencer*, againſt whom there was then no proceſs, but a readineſs in his creditor to take paper ſecurity inſtead of money, which he had a right to do. I rely on *Curwin* and *Milner* as a ſtronger caſe than this; being a deliberate act confirming an unreaſonable bargain when the party was fully informed of every thing, and under no promiſe that made it good. In *Cann* v. *Cann*, 1 *Will.* 727. Lord *Macclesfield* ſays, there was no colour to ſet aſide a releaſe, which the maker had a right to make, and was not ignorant of his right; and that ſolemn conveyances are not ſlightly to be blown down. I entirely concur therefore in opinion.

Lord Chancellor. Before I proceed to give my own opinion in this caſe, I muſt take notice, that Lord Chief Juſtice *Willes*, (who was abſent) has ſignified to me his intire concurrence on theſe three points. Next, that the great and able aſſiſtance, I have had in this caſe, has made my taſk extremely eaſy: and as I concur in the decree I am adviſed to make, the great pains in taking up and conſidering the points might have excuſed me from ſaying any thing. One thing I ought to ſay in the outſet; that if I could have foreſeen, upon what particular point the judgment of this caſe would fundamentally turn, I ſhould have ſpared the judges the trouble of this attendance. As three points have been properly made at the bar, it is neceſſary to ſay ſomething to each.

After diſcuſſing the firſt point as ſtated in page 423, he proceeded, The ſecond queſtion is, ſuppoſing the firſt contract to be valid in law, whether it was contrary to conſcience, and to be relieved againſt in this Court upon any head or principle in equity? I will allow the prudent example of not giving any direct and concluſive opinion. As it would be unneceſſary; it is ſafeſt not to do it: yet it has been made neceſſary to ſay ſomething upon it. It cannot be ſaid that ſuch

ſuch contracts deſerve to be encouraged, for they generally proceed from exceſſive prodigality on one hand, and extortion on the other; which are *vitia temporis*, and pernicious in their conſequences; and then it is the duty of a Court, if it can, to reſtrain them. This Court has an undoubted juriſdiction to relieve againſt every ſpecies of fraud. 1. Fraud which is *dolus malus*, may be actual, ariſing from facts and circumſtances of impoſition; which is the plaineſt caſe. 2. It may be apparent from the intrinſic nature and ſubject of the bargain itſelf; ſuch as no man in his ſenſes and not under deluſion ſhould make on the one hand, and as no honeſt and fair man would accept on the other; which are inequitable and unconſcientious bargains; and as ſuch even the common law has taken notice; for which if it would not look a little ludicrous might be cited 1 *Lev.* 3. *James* v. *Morgan*. A third kind of fraud is, which may be preſumed from the circumſtances and conditions of the parties contracting: and this goes farther than the rule of the laws, which is, that it muſt be proved, not preſumed; but it is wiſely eſtabliſhed in this Court to prevent taking ſurreptitious advantage of the weakneſs or neceſſity of another, which knowingly to do is equally againſt conſcience as to take advantage of his ignorance; a perſon is as equally unable to judge for himſelf in one as in the other. A fourth kind of fraud may be collected and inferred in the conſideration of this Court from the nature and circumſtances of the tranſaction, as being an impoſition and deceit on other perſons not parties to the fraudulent agreement. It may ſound odd, that an agreement may be infected by being a deceit on others not parties: but ſuch there are, and againſt ſuch there has been relief. Of this kind have been marriage-brokage[a] contracts; neither of the parties herein being deceived: but they tend neceſſarily to the deceit of the one party to the marriage, or to the parent, or to the friend. So in the clandeſtine, private agreement to return part of the portion of the wife or proviſion ſtipulated for the huſband to the parent or guardian.[b] In moſt of theſe caſes it is done with their eyes open, and knowing what they do: but if there is a fraud therein, the Court holds it infected thereby, and relieves. So where a debtor enters into a deed of compoſition with his creditors for 10s. in the pound, or any other rate, attended with a *proviſo* that all creditors executed this within a certain period, if the debtor privately

[a] See *poſt*. Of procuring of Matches.

[b] See *poſt*. Of Impoſitions reſpecting Marriage Portions and Fortunes.

privately agrees with one creditor to induce him to ſign this deed, that he will pay or ſecure him a greater ſum in reſpect to his particular debt: in this there can be no particular deceit on the ſide of the debtor, who is party thereto, but it tends to the deceit of the other creditors, who relied on an equal compoſition, and did it out of compaſſion to the debtor. This Court therefore relieves againſt all ſuch underhand bargains. So of *premiums* contracted to be given for preferring or recommending to a public office or employment [a]: none of the parties are defrauded, but the perſons having the legal appointment of theſe offices, are or may be deceived thereby; or if any perſon, agreeing to take the *premium*, has authority to appoint the officer, it tends to public miſchief by introducing an unworthy object for an unworthy conſideration. Theſe caſes ſhew what Courts of equity mean, when they profeſs to go on reaſons drawn from public utility. To weaken the force of ſuch reaſons, they have been called political arguments, and introducing politics into the deciſion of Courts of juſtice. This was ſhewing the thing in the light which beſt ſerved the argument for Sir *Abraham Janſſen*, but far from the true one, if the word *politics* be taken in the common acceptation: but if in its true original meaning, it comprehends every thing that concerns the government of the country; of which the adminiſtration of juſtice makes a conſiderable part; and in this ſenſe it is admitted always. To apply this: thus far, and in this ſenſe, is relief in a Court of equity founded on public utility. Particular perſons in contracts ſhall not only tranſact *bona fide* between themſelves, but ſhall not tranſact *mala fide* in reſpect to other perſons, who ſtand in ſuch a relation to either as to be affected by the contract or the conſequence of it; and as the reſt of mankind beſides the parties contracting are concerned, it is properly ſaid to be governed on public utility. The laſt head of fraud, on which there has been relief, is that which infects catching bargains with heirs, reverſioners, or expectants, in the life of the fathers, &c. againſt which relief always extended. Theſe have been generally mixed caſes, compounded of all or ſeveral *ſpecies* of fraud; there being ſometimes proof of actual fraud, which is always deciſive. There is always fraud preſumed or inferred from the circumſtances or conditions of the parties contracting; weakneſs on one ſide, uſury on the other, or extortion or advantage taken of that weakneſs.

[a] See *poſt*. Of Buying and Selling Public Offices.

neſs. There has been always an appearance of fraud from the nature of the bargain; which was the particular ground, on which there was relief againſt *Pitt*; there being no declaration there of any circumvention, as appears from the book, but merely from the intrinſic unconſcionableneſs of the bargain. In moſt of theſe caſes have concurred deceit and illuſion on other perſons not privy to the fraudulent agreement: the father, anceſtor, or relation, from whom was the expectation of the eſtate, has been kept in the dark, the heir or expectant has been kept from diſcloſing his circumſtances, and reſorting to them for their advice, which might have tended to his relief and reformation. This miſleads the anceſtor; who has been ſeduced not to leave his eſtate to his heir and family, but to a ſet of artful perſons, who have divided the ſpoil beforehand. Conſider which of theſe ſpecies is in the preſent caſe. There is no colour of evidence of actual fraud in Sir *Abraham Janſſen*; who did not think he was doing any thing immoral or unjuſt: although if the declaration of Mr. *Spencer* can be believed, Sir *Abraham Janſſen* had a miſgiving, how far it could be held good in this Court. But though this caſe is clearer of actual fraud than almoſt any that has come, yet ſeveral things are inſiſted upon for Mr. *John Spencer*'s executors, as neceſſity on the one ſide and advantage taken of it on the other: unconſcionableneſs in its nature from the terms of paying two for one in caſe of the death of an old woman the next week or day: that there was deceit upon her, who was in *loco parentis*, from whom were his great expectations: this however was the thing intended. I admit alſo, there are more circumſtances alledged on the ſide of Sir *Abraham Janſſen* to weaken and take off, than have concurred in moſt caſes of this kind. Mr. *Spencer* was of the age of thirty; poſſeſſed of a great eſtate of his own; not weak in mind, but of good ſenſe and parts: though in that the witneſſes differ. If it was neceſſary to give an opinion on this point, I ſhould conſider the weight of theſe objections and the anſwers to them: but as it is not, I ſhall only conſider the contingency inſerted, which was the cure of the whole. I would not have it thought the inſertion of ſuch a contingency would in every caſe ſanctify ſuch a bargain. Suppoſe ſuch a bargain made by a ſon in life of his father or grandfather, on whom was his whole dependency; I appeal to every one what the conſequence of it would be. Whether ſuch a contingency is inſerted or not, it will come to the ſame thing, the creditor knowing the fund for payment muſt depend upon the debtor's ſurviving

viving the father or grandfather, whether it is ſaid ſo or not; and therefore I have always thought, there was great ſenſe, in what *Vernon* reports to be ſaid by the Court in *Berney* verſus *Pitt*; "that the expreſſing the death of the ſon in life of the father makes the caſe worſe, &c." I have not mentioned the reaſons, drawn from the diſcouragement of prodigality and preventing the ruin of families: conſiderations of weight, and ingredients which the Court has very wiſely always taken along with them. It is ſaid for Sir *Abraham Janſſen* to be vain and wild for the Court to proceed on ſuch principles: if it had been ſaid it was effectual in many inſtances, I ſhould have agreed thereto; but I cannot hold that to be vain and wild, which the law of all countries and all wiſe legiſlatures have endeavoured at as far as poſſible. The ſenate and law-makers in *Rome* were not ſo weak as not to know, that a law to reſtrain prodigality, to prevent a ſon running in debt in the life of his father, would be vain in many caſes, yet they made laws to this purpoſe; viz. the *Macedonian* decree, already mentioned; happy, if they could in ſome degree prevent it: *eſt aliquod prodire tenus*. It is ſaid for Sir *Abraham Janſſen* that this would be to aſſume a legiſlative authority; and that ſeveral acts of parliament have been thought neceſſary to reſtrain and make void contracts of a pernicious tendency to the public. What can properly be called ſuch an aſſuming in this Court, I utterly diſclaim: but notwithſtanding I ſhall not be afraid to exerciſe a juriſdiction I find eſtabliſhed, and ſhall adhere to precedents. As far therefore as the Court went in *Berney* againſt *Pitt*, in *Twiſleton* againſt *Griffith*, in *Curwyn* againſt *Milner*, and the opinion of Lord *Talbot* in the original tranſaction in *Cole* againſt *Gibbons*, ſo far, and as far as theſe principles do naturally and juſtly lead, I ſhall not ſcruple to follow. The acts of parliament inſtanced will be found to be made, (many of them) not for want of power in this Court to give relief in many of theſe contracts, but to make them void in law, to give the party a ſhort remedy againſt them. The judgment I am going to give will not be founded upon this[a]: but I have done it, thatthe work of this day might not be miſunderſtood, or precedents thought to be ſhaken: not that this eſtabliſhes ſuch a contract, as is called fair, like killing fairly in a duel, which the law does not allow as an excuſe for murder, junct annuities and *poſt obits* are grown into traffic; which ought to abate of its fairneſs. *Cheſterfield* v. *Janſſen*. 2 *Veſey's Reports*, 125. 1750.

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[a] This judgment was founded on *Spencer*'s ſubſequent confirmation. See poſt.

When Sir *William Stanhope* was about the age of nineteen, his father the late earl of *Cheſterfield*, in 1721, ſettled upon him, on his marriage, eſtates of the yearly value of 1000l. and upwards, to the uſe of Sir *William* for life only, with the common remainders: in a very few years afterwards, he had been unwarily drawn in to loſe ſeveral large ſums in gaming, and being in very great diſtreſs for money, the late Mr. *Spinks* hearing of it, and being uſed to help gentlemen in ſuch difficulties, applied to him, and offered to lend him 800l. provided he ſhould give ſuch ſecurity as he ſhould deſire, which *Stanhope* being under great neceſſities, accepted of. Accordingly, on the 13th of June, 1737, a deed was executed, whereby *Stanhope*, in conſideration of 800l. granted to *William Spinks*, and his aſſigns, an annuity or yearly rent-charge of 100l. iſſuing out of lands of 700l. per ann. value, for the term of ninety-nine years, if *Stanhope* ſhould ſo long live, to be paid quarterly, with a clauſe of diſtreſs, if the annuity ſhould be in arrear twenty days after one day of payment; and a clauſe for receiving the rents and profits of the eſtate, till *Spinks* was ſatisfied; and in the deed was an agreement, that if *Stanhope* ſhould, at the end of three years next enſuing the date, or at any time before, be minded to redeem the ſaid annuity, and ſhould, at or before the end of three years, give notice of his intention in writing to *Spinks*, his executors, &c. at or on any of the days of payment, and ſhould at the end of ſix calendar months after ſuch notice pay unto *Spinks*, his executors, &c. 850l. and all arrears of the ſaid annuity, that in ſuch caſe the whole ſhould be void; and in this deed *Stanhope* was made to covenant, that in caſe *Spinks* ſhould be minded to purchaſe another annuity of 100l. from *Stanhope*, and ſhould on or before the 13th of *September* then next, pay to *Stanhope* 800l. that he ſhould grant him another annuity of 100l. iſſuing out of the ſame lands, and upon the ſame terms with the firſt in every reſpect, and with the like clauſe of redemption; there was a farther covenant, that if *Spinks* ſhould be minded to purchaſe another annuity of 100l. and ſhould on or before the thirteenth of *December* next enſuing, pay unto *Stanhope* the further ſum of 800l. that he ſhould grant another annuity of 100l. iſſuing out of the ſame lands, upon the ſame terms with the two former, and ſubject to the like proviſo of redemption: in about three months after the execution of this deed, *Spinks* made a propoſal to *Stanhope*, that he would deliver up this indenture of the 13th of *June*, 1727, and would advance a further ſum of 1000l. ſo as to make up the whole 1800l. and that *Stanhope* ſhould grant to

him

him one annuity iſſuing out of the ſaid premiſes of 300l. during their joint lives; and by deed of the 12th of *Sept.* 1727, an annuity was granted accordingly, and a clauſe for redemption indorſed. In the beginning of *Dec.* following, *Spinks* made a new propoſal of advancing a farther ſum of money, upon *Stanhope*'s granting him an annuity of 300l. during *Stanhope*'s life only, in lieu of the *junctim* annuity; accordingly on the 13th of *December*, 1727, *Stanhope* executed a deed, and ſigned a receipt for 2250l. the conſideration therein mentioned, with a proviſo of redemption at or before the end of three years, if the ſaid *Stanhope* ſhall give notice in writing of his intention to *Spinks*, his executors, &c. on one of the quarter days appointed for payment, and ſhall at the end of ſix calendar months after ſuch notice, pay to *Spinks*, his executors, &c. the ſum of 2400l. and all arrears of the annuity, then the annuity of 300l. to be void: on the 2nd of *April*, 1728, *Stanhope* executed a deed of truſt to the earl of *Cheſterfield* and Mr. *Rudge*, of his whole eſtate, for the ſatisfaction of his creditors, reſerving only 2000l. per annum for himſelf and family, the reſidue to pay debts; afterwards a private act of parliament in 5 *G.* II. was procured for a ſale of ſome of the manors; and *Stanhope* by his ſteward applied in *July*, 1738, to *Spinks* to redeem the annuity upon payment of all the principal money advanced; but *Spinks* made anſwer, that he did not know what *Stanhope* meant, that he did not want money, and that *Stanhope* had no right to redeem; upon which *Stanhope* filed a bill againſt *Spinks* on the 6th of *December*, 1739, but *Spinks* dying before he could put in an anſwer, a bill of rivivor was filed againſt his executors, on the 25th of *February* following; the prayer of it was, that *Stanhope* may be admitted to redeem the annuity of 300l. upon the payment of what ſhall appear to be due for principal and intereſt upon a fair account; and if upon ſuch account it ſhall appear that *Spinks* was fully paid all his principal and intereſt, that the ſeveral deeds may be delivered up, and if *Spinks* ſhall appear to be overpaid, that his executors may refund.

It was proved in the cauſe, that *Spinks* was of no trade, but his ſole buſineſs was in buying of annuities for ſingle or joint lives; and that one *Rogers* a broker, purchaſed for *Spinks*, only by his directions, annuities to the value of 2000l. a year whilſt the witneſs was a clerk to *Rogers*.

There were no proofs offered of *Stanhope*'s diſtreſs at the time *Spinks* applied to him; but depoſitions on his part that none of the deeds were peruſed by any counſel for him, but by *Roberts* only as the counſel for *Spinks*.

The

The Lord Chancellor after argument ſaid, as I am at preſent adviſed, I have no doubt but Sir *William Stanhope* is intitled to a redemption; the queſtion is, whether he is intitled *ab initio*, or only from the year 1738, the time Sir *William Stanhope* offered to redeem.

Upon the recommendation of Lord Chancellor the affair was compromiſed on the following terms.

The money already paid into court was to be applied, in the firſt place, to clear the arrears of the annuity to *Midſummer*, 1738, and the ſurplus towards the payment of the 2250l. and what it ſhall want of clearing the whole principal advanced, to be paid in two months, but no intereſt from 1738 to the preſent time.

After the regiſter had drawn up minutes of the agreement, Lord Chancellor declared he had a very great averſion to contracts of this kind, and that he was very inclinable to decree a redemption *ab initio*, if it could have been done conſiſtent with the rules of equity. Sir *William Stanhope*, v. *Cope* and *John Roberts* executors of *Spinks*, 2 *Atkins's Reports*, 231.

Thomas Hill, at the age of twenty-four, in 1720, entered into a bond to *Iſaac Caillovel* for the payment of 520l. within ſix months after his father's death, if he ſurvived him: if not, to be void, the father being then ſeventy.

Caillovel the obligee died in 1720, his executors in 1722 aſſigned it for valuable conſideration, for aught that appeared to the contrary, to *Lane:* the father died in 1731; after his death and the death of *Lane*, letters were wrote to the ſon, demanding it: who did not deny his entering into it, but diſputed his knowing any thing of the executor of *Lane*; no action was brought thereon in the life of the ſon, who died in 1734, but afterwards application was made to his widow and executors, and a compoſition offered, with which ſhe did not comply. An action was brought; and verdict and judgment followed thereon; but before judgment the executrix brought this bill for relief, againſt the repreſentative at a fourth hand of the obligee, and againſt the executor of *Lane*, as being obtained from an extravagant young heir, neceſſitous, and dependent upon his father; and an extraordinary loan under oppreſſive and hard circumſtances. Nor could the aſſignment alter it; or put the aſſignee in a better caſe than the obligee himſelf; for he muſt take it ſubject to all the equity upon it.

Lord Chancellor. A very ſtrong caſe for the defendant; it is true, that the rule of the Court is, that on a bond from a young

young heir in life of his father, being extravagant; the Court will hold the creditor to ſtrict proof, and either relieve againſt, or reduce it to the ſum, that was advanced: and had this queſtion ariſen recently between the original creditor and debtor, and a bill brought for relief, that appearance in the condition of the bond would have made me expect an account from the defendant upon what conſideration it aroſe. Although it is not to be laid down in general that where a bill is brought for relief againſt a bond, the plaintiff ſhall be relieved, unleſs there is actual proof of the payment of the money; for that would make bonds uſeleſs. Then as to the circumſtance here, it induces ſuſpicion; but that cannot be certain; for out of humanity and tenderneſs ſuch a ſum might be advanced. Can I relieve without proof of impoſition? Why did not the ſon bring a bill for relief in his life upon the demand againſt him? for it is not prudent to wait, till the action is brought. This is a ſtrong caſe even for *Caillovell;* but in the caſe of the aſſignee for valuable conſideration it is ſtronger. The rule is right, that who takes the aſſignment of a bond, being a *choſe in action*, takes it ſubject to all the equity in the hands of the original obligee: but length of time, and circumſtances may vary that, and make the caſe of the aſſignee ſtronger; for why was not the bill brought when the facts were recent? The only relief is againſt the penalty; to which every obligor coming into this Court is intitled. Had the defendant proved leſs, conſidering how little the plaintiff has proved, I ſhould be ſtill of opinion, that this application for relief ſhould be diſmiſſed. *Hill* v. *Caillovell.* 1 *Veſey's Reports*, 122. 1748.

Gwynne being twenty-three years of age, was entitled to an eſtate of 2000l. a year after the death of his father, who was eighty-one years of age. *Gwynne* having offended his father by an imprudent match, he and his wife were turned out of doors by their father. To ſupply their neceſſaries *Gwynne* advertiſed in the public papers, to ſell an annuity of 300l. a year, to commence from after the death of a man of great age. *Heaton* knew the age of the father, and applied, and bought this annuity from *Gwynne* on the following terms. *Heaton* was to grant *Gwynne* an annuity of 400l. a year during the father's life, which was valued at ſeven year's purchaſe, 2800l. and *Gwynne* was to grant *Heaton* an annuity of 300l. a year for ever, to commence from the death of the father, which was valued at ſeventeen years

purchaſe, 5100l. the difference between theſe ſums being 2300l. which *Heaton* was to pay *Gwynne*, and *Gwynne* was to give the neceſſary ſecurities at his own expence. *Gwynne*'s father ſurvived this tranſaction eighteen months, but he had only received one year's annuity. When the old man died, *Gwynne* did not confirm the bargain, but he offered *Heaton* 1000l. to cancel the bargain, which *Heaton* refuſed; he therefore applies to the Court of Chancery for relief, as being an unconſcionable bargain.

In behalf of *Gwynne* it was argued as follows: On the part of *Heaton*, the defence is, that this was the offer of *Gwynne*, and that it was only a good bargain: it is true, a bargain is not to be deſtroyed where there is any meaſure of equality. In thoſe caſes, it is always upon the propoſal of the perſon who is to give the good bargain. Take the compariſon: an annuity in fee, at the death of a man eighty-one years old, is eſtimated at ſeventeen years purchaſe, and the life of eighty-one, at ſeven years purchaſe, which is not worth one, upon the tables. This is deciſive againſt *Heaton*; it is an advantage that no man in a common ſituation would accede to: *Gwynne* is to give every poſſible ſecurity, and at his own expence. In matters of a common kind, if a purchaſer has a little advantage, the Court has it in its diſcretion whether to take it away. From the time of Lord *Guildford*, to the preſent, there is no caſe like this, where relief has not been granted, except upon a confirmation[a].

Lord *Hardwicke*'s principle was, that wherever there was an unconſcionable bargain entered into by a young heir, this Court ſhould relieve.

Two years purchaſe is the utmoſt that ſhould be given for a life of eighty-one, by Dr. *Halley*'s calculations.

On behalf of *Heaton* it was argued that he did not in general deal in annuities. It is not neceſſary in this caſe to conſider the caſe of young heirs dependent on their parents. This is the caſe of a gentleman living on his own fortune, applied to by *Gwynne*, and invited into the bargain, and the terms deliberately ſettled by him and his friends. The queſtion is ſingly, whether this agreement is upon ſuch an inadequate conſideration, that this Court will ſet it aſide. *Gwynne* was intitled to a remainder in an eſtate of 2000l. a year, and had incurred the diſpleaſure of his father, by marrying a ſervant in the houſe: on which account his father at his death gave all the property he could diſpoſe of to

[a] See poſt. Confirmation of Bargains.

to the ſecond ſon. *Gwynne* put the advertiſement into the papers, offering the annuity or rent charge of 300l. upon the death of an aged perſon. His agent wrote to *Heaton*, propoſing the terms; and it comes out in evidence, that the ſame terms had been propoſed to other perſons. *Gwynne* told *Heaton*, that he had given his agent authority to propoſe the terms. The 2300l. was paid. If the father had lived ſeven years, there could not have been a pretence to come into this Court, and ſet the tranſaction aſide. There have been a multitude of caſes in this Court, where perſons have obtained an advantage not by fraud, but by a fair bargain, that the Court would not deprive them of it. The old gentleman had no infirmity, or circumſtances of diſorder, to ſhew him to be in danger of dying. This is not ſuch a conſideration as this Court will think unreaſonable, and ſet aſide. The circumſtances are not ſuch as to make void the tranſaction, they are not unreaſonable or unconſcionable terms. The caſes all ſtand upon their *own* circumſtances, the only reſemblance this bears to them is, that it is the caſe of an eſtate-tail, *after the death* of the father.

Every propoſal came from *Gwynne*, there was no haggling about the price, but his language now is, I think I have given too much, and therefore I come into equity to reſcind the tranſaction. This is the fair repreſentation, but the moſt extraordinary caſe ever produced. The draught was approved by counſel, on the part of *Gwynne*. He is not a young heir in the ſenſe of any of the caſes, nor is this at all like them. As to the expences being deducted, *Heaton* gets nothing by that; the borrower always pays expences. He is not a young man following expenſive pleaſures. What would a prudent man adviſe him to do, but to procure a permanent proviſion during the life of his father? Is there any ground of policy here to overturn a bargain, the object of which was a proviſion for himſelf, his wife, and a probable family during the life of his father? Are the means by which he got that proviſion improper? He could give no ſecurity, what could he do more proper than to grant a rent charge out of the eſtate? This is not a rent charge to exhauſt the eſtate, to render him indigent when he ſhould come into poſſeſſion of it; the means are not reprehenſible in any reſpect. This is not within the ground of the caſes. The only ground here is, that by the means of certain calculations they have found out that the ſum is too large. There is no caſe where the price of contingencies has been the ground for ſetting aſide a bargain: calculations, though

very uſeful as to large numbers, do not apply to individuals. The queſtion is, whether *Heaton* ought or ought not to have taken this bargain? If he ought to have refuſed it, as being an unconſcionable bargain, it muſt be on the ground that it was with an heir in diſtreſs, and apparently an unconſcionable bargain[a].

In reply it was ſaid that it is certainly true, that Courts have no cenſorial authority, but it does not follow from hence, that they can give no relief. The rules of morals, *honeſte vivere, alienum non lædere, ſuum cuique tribuere*, do not all apply to Courts of juſtice. *Honeſte vivere* is not their object, *ſuum cuique tribuere* is their proper ground; but they will prevent one man from injuring another. If the bargain is beyond the limitation the law has fixed, it will puniſh. But there are caſes which are not illegal, but which ſtill are unconſcionable. If a man finds another in diſtreſs, and ſupplies him on unconſcionable terms, the Court in relieving him, enforces the rule of morality. It is ſaid, that this is not the caſe of a young heir. I do not preſume the Court has gone on the idea of relieving the father. *Guynne* was a young man juſt of age—his eſtate was expectant; he was juſt in the ſituation of an apparent heir, he muſt have applied to his father, if he had not found a money-lender, and have ſettled the eſtate; which the father would have done for the ſake of the ſecond ſon. The circumſtances put calculations out of the caſe, the amount muſt be three or four times the principal money. This is apparently exorbitant: to buy a remainder in fee at ſeventeen years purchaſe, the life muſt be of very conſiderable value, it cannot be worth only ſeven years purchaſe. The circumſtances put together ſhew the bargain to be enormous. As to not taking notice of the event, I do not deſire a caſualty to be conſidered: but what at the ſame time was moſt probable to happen

[a] The general rule is that where the heir has a maintenance from the father, and takes up goods at extravagant rates, a Court of equity will in ſuch caſes relieve him after the death of his father, and reduce the bargain to the common value of the goods, with an allowance of intereſt from the time of taking them up, becauſe it is an oppreſſive bargain, and merely to ſupply the extravagance and prodigality of the heir. But if the heir had no maintenance from his father and was turned out upon unreaſonable diſpleaſure, there if the bargain be made and is not exceſſively beyond the proportion of ſuch riſk, ſuch bargain ſhall ſtand, becauſe it is not to ſupply the luxury and prodigality of the heir, but to keep him from ſtarving; and ſince the ſeller would have loſt his money in caſe the heir had died during the life of his father, he ought to have a proportional benefit for ſuch hazard. *Lord Chief Baron Gilbert's Lex prætoria*, 292.

pen ſhould be conſidered, and that *Heaton* paid only the 2300l.

Lord Chancellor. As you ſhape your caſe, 2300l. only was advanced, and there was an exorbitant bargain for the 2800l. Where a mortgage is to be redeemed, it muſt be upon payment of the principal, intereſt, and coſts.

This bill is brought to be relieved againſt a conveyance of the 12th of *June*, 1773, ſtating the intereſt of *Gwynne*, in his father's eſtate, and conveying a rent charge of 300l. *per annum*, on the ground of groſs inequality, and as being entered into by a man who had an eſtate-tail, expectant on the death of his father: and it takes in a great many fraudulent and oppreſſive circumſtances, but theſe are not proved. *Gwynne* made the offer in its extent to *Heaton*, who received it in the very ſhape in which it was offered. This excludes every ſuggeſtion of expreſs proof of deceit by *Heaton*, in whom no confidence was placed, nor any aſſumed by him. There is no expreſs proof of *Heaton*'s labouring *Gwynne* to obtain a better ſecurity than was offered to him; he is not charged with miſleading his judgment, or tampering with his poverty. On the other hand, the terms are ſo very groſsly unequal, as to deſerve all that has been ſaid to be neceſſary to the ſetting the bargain aſide. He was a young man of twenty-three, married, contrary to the inclination of the father, to a young woman, by whom he has children, though not male iſſue, who therefore do not ſucceed to the eſtate-tail. The father was at leaſt ſeventy-nine, according to the plaintiff's evidence, and had additional ſigns of immediate decay. On the part of the defendant, *Heaton*, the evidence of only two witneſſes have been read; one ſays, his health was better than his ſpirits; the ſecond, a ſervant who had lived in the family ſome years before, remembered his maſter's ſtate of health at that time, which was in general that of a man of his age; he returned into the ſervice the beginning of the month in which this tranſaction began, and ſays, that he now found him remarkably changed for the worſe, and that he was obliged to have a ſervant ſleep in the room. The apprehenſion of diſſolution began to prevail with himſelf and all about him: this ſituation appears to be perfectly known to *Heaton*. This is ſufficient to ſupport thoſe witneſſes, who ſay, that one or two years purchaſe was the full value of his life. I am the fuller in ſtating theſe circumſtances, becauſe the agent ſhould have been more careful in procuring evidence. To ſet aſide a conveyance, there muſt be an inequality ſo ſtrong,

groſs,

groſs, and manifeſt, that it muſt be impoſſible to ſtate it to a man of common ſenſe, without producing an exclamation at the inequality of it. The principle then is looſe enough, looſer than I wiſh to be eſtabliſhed in a Court of juſtice; but to reverſe the principles which have been laid down by ſucceſſive great names would be to alter the rules of property. In the preſent caſe the conſiderable inequality is referable to caſes already determined. There is an extraordinary anxiety in the preamble of the deed; to ſtate the circumſtances, ſo as to take it out of the objections in former caſes; this is a ſtrong circumſtance to ſhew that the parties thought it would be liable to be ſet aſide: the rule therefore muſt be attended to. It is ſaid, a bargain cannot be ſet aſide upon inadequacy of price only. If parties are of full age, treating upon equal terms without impoſition, and there is an inequality, even if it is a groſs one, the Court in general has not ſet it aſide. The neareſt inſtance which I recollect of the Court's relieving in ſuch circumſtances is, Sir *Thomas Meers*'s caſe (cited in *Forreſter* 40.) That caſe ſtands alone if conſidered as bearing analogy to the preſent. That was not the caſe of an expectant heir; but between perſons ſtanding indifferently; and it has always been held, that intereſt upon intereſt was unconſcionable. It has alſo been ſaid, that the owners of reverſionary intereſts are as competent to diſpoſe of them as the owners of other intereſts. In the modern caſes this is allowed, with the qualification that there is a policy in juſtice, protecting the perſon who has the expectancy, and reducing him to the ſituation of an infant againſt the effects of his own conduct. The Court avows the diſability, but not the length to which it diſables. The principle is recognized, and the rule laid down in *Cole* and *Gibbons* (poſt) and the Court has proceeded upon it for near a century. The practice has overturned the rule upon which *Nott* and *Hill* (ante) was determined. The heir of a family dealing for an expectancy in that family, ſhall be diſtinguiſhed from ordinary caſes, and an unconſcionable bargain made with him ſhall not only be looked upon as oppreſſive in the particular inſtance, and therefore avoided, but as pernicious in principal and therefore expreſſed. This muſt be taken to be the eſtabliſhed principle. But it is objected that here the ſon had no allowance; that circumſtance occurred in many of the caſes. *Nott* and *Hill* had every thing in its favour, the father was corrupt, and it was clear of fraud, except ſuch as ariſes from inequality only. In *Barnardiſton* againſt *Lingood*, and *Cheſterfield* and *Janſſen*, (ante), Lord *Hardwicke* treats

treats inequality as a mark of fraud. *Curwyn* and *Milner*, was perfectly free from fraud, it was 500l. to pay 1000l. on the deceaſe of either of the parents; he paid the money, and afterwards brought his bill, and was relieved. In thoſe caſes fraud is not the ground of relief; it is the example, and pernicious conſequences. It is contended, that this caſe is not within the view. I think no man's caſe can be more ſo than an heir expectant of an eſtate-tail, and the father in poſſeſſion of another eſtate, ſo that he ſtood fully in the ſituation which has ſerved as an example of unequal dealing in former times. Its being mere ſubſiſtence, he having no allowance from his father, is no objection, that was the ſituation in *Nott* and *Hill*, and in *Twiſleton* and *Griffith* (ante), and is therefore no bar to the relief. Its being hawked about, is not an objection, as it only ſhews the neceſſity he was under. The main evidence relied upon by the defendant, is that of the agent who tranſacted the buſineſs, and who knew at the time that he was tranſacting a matter of ſome legal danger. The deed of the 12th of *June*, 1773, granting the rent charge, recites a calculation of the value of the annuity at ſeventeen years purchaſe; that *Gwynne* was deſirous to ſell, and had cauſed it to be advertiſed; that *Heaton* applied in conſequence to *Gwynne* and his agents, who propoſed to ſecure it on the eſtate-tail, and therefore in conſideration of 5100l. he bargained. *Heaton*, the purchaſer, knowing the actual ſtate of the lives for which he was bargaining, the inequality which that introduced, and the indigence of the man with whom he was contracting, makes a bargain with him, which appears as enormous as that of *Nott* and *Hill*, without one circumſtance to caſt a ſhade over the caſe. It muſt be ſet aſide, with the reſervations that are uſed in fair contracts.

The money really advanced to *Gwynne* muſt be paid with intereſt, together with the expences of the deeds, and inſurance, and the coſts of taking the accounts muſt be added, for that muſt be in every caſe, although it ſeems very hard where a contract is ſet aſide upon an equitable ground, that ſtill the contract ſhould remain a ſecurity for all the coſts generally, and which have been occaſioned by *Heaton*'s putting *Gwynne* to the neceſſity of filing a bill, and by his defending a contract which ought not to ſtand—But *Heaton* to have no other coſts. *Gwynne* v. *Heaton*. 1 *Brown*'s *Rep.* 1, 1778.

THE preceding caſes have been confined to bargains with heir

heirs on their expectancies; we will now inſert a few caſes of a more general nature.

Lawley, a younger ſon, and entitled to an annuity of 200l. a year for his life, out of the eſtate of his elder brother, being involved in debt, and a priſoner in the *Fleet*, and having no other means of delivering himſelf from *gaol*, than by diſpoſing of the whole, or part of the annuity, on the 1ſt of *June*, 1737, aſſigned to Mr. *Davenant* 150l. a year, part thereof, for 1050l. In the deed there was a proviſo, that if at any time *Lawley* ſhould deſire to repurchaſe this annuity, and ſhould give ſix months notice to *Davenant* in writing, of his intention ſo to do, and at the expiration of ſuch notice pay to *Davenant*, his executors, &c. 1050l. then *Davenant* was to reſign it to *Lawley*. After this deed was ready to be ſigned, and when all parties were met for that purpoſe, *Davenant* inſiſted upon an indorſement, being written on the back of the deed and to be ſigned by *Lawley*, that in caſe he ſhould repurchaſe this annuity, the ſame ſhould be upon the repayment of 1050l. and alſo 75l. and all arrears, which *Lawley* alledged he conſented to by reaſon of his diſtreſſed circumſtances.

Davenant being dead, *Lawley* applied to Chancery, for an account of what was due to *Davenant*'s eſtate for principal and intereſt of 1050l. and what *Hooper* (*Davenant*'s executor) had paid for the inſurance of *Lawley*'s life, which *Lawley* ſubmits to allow, and that, upon payment of what ſhould be due, *Hooper* might re-aſſign the ſaid annuity.

Lord Chancellor. There has been a long ſtruggle between the equity of this Court, and perſons who have made it their endeavours to find out ſchemes to get exorbitant intereſt, and to evade the ſtatutes of uſury: the Court very wiſely hath never laid down any general rule beyond which it will not go, leſt other means of avoiding the equity of the Court ſhould be found out: therefore they always determine upon the particular circumſtances of each caſe; and wherever they have found the leaſt tincture of fraud in any of theſe oppreſſive bargains, relief hath always been given.

In this caſe there are two queſtions to be conſidered, firſt, whether this aſſignment of the firſt of *June* 1737, is to be conſidered as an abſolute ſale, or as a ſecurity, or loan.

Secondly, whether there be any ground to relieve againſt it, admitting it to be a ſale.

As to the firſt, I think (though there is no occaſion to determine it) there is a ſtrong foundation to conſider it as a loan of money, and I really believe in my conſcience, that

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ninety-nine in a hundred of theſe bargains are nothing but loans turned into this ſhape to avoid the ſtatutes of uſury.

Here was an extravagant young man, who had been twice in priſon, was committed to the *Fleet* the 2d of *June* 1736, and diſcharged the 1ſt of *November* following, was again in priſon the 7th of *March* 1737, and this produced the bargain: the deed bears date 1ſt of *June* 1737, and he is diſcharged out of the *Fleet* the 3d: the proviſo in the deed uſes the word *re-purchaſe*, but there is very little difference in reality between the meaning of the word redemption and repurchaſe; one of the witneſſes (*Sparrow*, the defendant's ſolicitor) uſes the word redemption; and I take the word purchaſe, uſed in all the other depoſitions, to be only a cant word, meaning a ſale or mortgage; and the indorſement on the back of the deed uſes the words re-purchaſe and redemption promiſcuouſly, which plainly ſhews that it was conſidered by all parties as a power to redeem.

But it is objected, that this is not to be conſidered as a mortgage, becauſe there is no covenant in the deed to repay the money; but that objection is not well founded, for it is not neceſſary; all *Welſh* mortgages are without this covenant, and ſo are moſt copyhold mortgages.

Another objection which has been made, was, that a man muſt be out of his ſenſes to lend his money upon annuities for a life, which may drop the next day, and ſpeaking abſtractly, and merely on the nature of annuities for life, there ſeems to be weight in the objection: but every body knows that this caſualty of loſing the principal, is ſecured, by inſuring the life on which the annuity depends.

But it is ſaid that every life cannot be inſured, the inſurance office will require different terms, according to the life; but ſtill they may be inſured, and it is admitted that this life was a good one.

But there are two circumſtances more, which ſhew that this was intended and underſtood as a ſecurity: when the parties met to have the deed executed, it was objected by the lender, to the terms of the condition to purchaſe back, that it was made to be at any time, and he ſaid it was uſual to reſtrain it to a certain period of time.

What does this import? It is plainly the language of a lender of a ſum of money: another circumſtance is, that he inſiſted upon the payment of ſeventy-five pounds more, and would have ſix months notice; the conſequence of this was, that he would have this time to find out another hand to take his money, and would have intereſt for his money during theſe ſix months, but upon payment of ſeventy-

five

five pounds more he might redeem, which was the ſame, as ſaying, you ſhall give me ſix month's notice, or pay me ſix months of the annuity.

Therefore, upon all the circumſtances, I think this was, and is to be taken as a loan of money, turned into this ſhape only to avoid the ſtatute of uſury; but I do not think that I am under any abſolute neceſſity to determine this point, for I am of opinion, that this is ſuch an agreement as this Court ought not to ſuffer to ſtand, taking it as an abſolute ſale.

An objection was made, that great inconvenience would follow from ſuch a determination as this, becauſe it would oblige all annuitants of this kind to ſell abſolutely; but I think no inconvenience of this ſort will enſue, it will rather hinder ſuch annuitants from ſelling at all; and I believe in my conſcience, that the difference which is now made between the value of annuities for one's own life, and that of another, has been entirely cauſed by the dealers in theſe annuities.

But conſider the circumſtances of this caſe, ſuppoſing it a ſale, here was no pretence for the addition of 75l. this was not an intereſt which was growing better, on the contrary, every year the plaintiff lived he was growing worſe; and yet he is made to agree to pay 75l. more for the repurchaſe, as if the annuity was worth more after three years of his life was ſpent, than it was at the time of the purchaſe: *Lawley* was then a priſoner in the *Fleet*, and in diſtreſs, and was forced to ſubmit to thoſe terms, he could not then oppoſe them, and therefore I conſider the variation of the terms of agreement as taking advantage of his diſtreſs, a variation for which there was no pretence, and a moſt unreaſonable thing; if then, this was unreaſonable, it affects the whole caſe, and the relief muſt be by ſetting aſide the whole agreement.

Therefore I declare, that under the circumſtances of this caſe, *Lawley* is entitled to the redemption of the ſum of 150l. a year, part of the annuity of 200l. aſſigned to *Davenant* the firſt of *June*, 1737, and that it ought to be re-conveyed to him upon the payment of the ſum 1050l. with legal intereſt for the ſame; and let it be referred to the Maſter to compute intereſt upon the ſaid ſum, at the rate of 5l. *per cent.* from the firſt of *June*, 1737, and let him enquire whether any thing hath been paid by *Davenant* in his life time, by his executor *Hooper* ſince his deceaſe, for the inſurance of *Lawley*'s life; and let what ſhall appear to have been, or that ſhall be reaſonably ſo paid, be added to the

the principal ſum of 1050l. and carry intereſt at the ſame rate from the reſpective times of paying and advancing the ſame; let him alſo take an account of all the ſums of money received by *Davenant* in his life time, and *Hooper* ſince his deceaſe, upon the account of the ſaid annual ſum of 150l. and let what ſhall be ſo found to have been received be applied, in the firſt place, in the payment of the intereſt of the 1050l. and afterwards in ſinking the principal. *Lawley* againſt *Hooper*, *Chancery*. 3 *Atkin's Reports*, 278. *November* 13, 1745.

Thomas, Earl of *Ardglaſſe*, in 1675, borrowed of *Henry Muſchamp* 300l. for which the earl granted to him 300l. a year ſecured on lands in *Ireland*, to commence from the earl's death without iſſue male: but with a proviſo that if the earl had any iſſue male who ſhould attain the age of twenty-one years, the grant was to be void. In caſe of the death of *Thomas* earl of *Ardglaſſe* without iſſue male, this eſtate was to go to his uncle *Vere Eſſex*. His uncle and himſelf now (1684) applied to the Court of Chancery to be relieved againſt this grant, alledging that it was obtained by fraud and practice, by debauching earl *Thomas* with drink and women. After this application *Muſchamp* contrived to induce earl *Thomas* to give up the object of it, and obtained from him a releaſe of that ſuit; after this earl *Thomas* died without iſſue, and his uncle *Vere Eſſex* earl of *Ardglaſſe*, being now entitled to the eſtate, applied to the Court of Chancery to ſet aſide the releaſe obtained by *Muſchamp* from earl *Thomas*, and alſo to diſincumber the eſtate from this charge of 300l. a year.

Upon the firſt hearing of this cauſe, the Lord *Keeper* though he declared there was foul practice, yet doubted, it might be too great a violation of contracts to ſet it aſide.

It appeared, that at the time of the bargain the earl was very young, and had forſaken his wife and her friends in *Ireland*, and lived here in *London* in riot and debauchery, and to ſupply his expences had made this bargain, without the advice of any friends or counſel of his own: but relied wholly on *Muſchamp*, and that the conſideration was but one year's purchaſe for a rent charge in fee, now fallen into poſſeſſion. And that the contingency of the earl dying without iſſue male (upon which *Muſchamp* for his defence chiefly inſiſted) was an artifice of *Muſchamp*'s, (the earl as appeared in proof, being diſabled to get children) and however that contingency might be uſed as an argument to perſuade the earl, that he had the beſt of the bargain,

bargain, yet the Lord *Keeper* did not think it likely that *Muſchamp* would have made it, but in expectation of an unreaſonable advantage: and that the earl would in a ſhort time by his vicious debauched courſe of life deſtroy himſelf (as he did). It appeared alſo that *Muſchamp* was informed by the earl's ſurgeon, that the earl was not able to get a child, and therefore the contingency was not to be looked upon as if the earl had been in ordinary circumſtances; but as it was in *Muſchamp*'s eye, who was his companion in theſe debaucheries: and it appeared alſo that *Muſchamp* was ſolicitous to draw the earl into the like bargains with other people, and that the releaſe was obtained without any conſideration.

Whereupon (although for *Muſchamp* it was inſiſted, that it was a juſt bargain, in regard of the contingency, that he had no means to recover his money again, and that the bargain was made when the earl was in good health, and was acknowleeged three months after in order to be enrolled, and that there was no fraud in gaining the grant or releaſe): the Lord *Keeper* declared, that the more he heard of the cauſe the worſe he liked it, and that the earl of *Ardglaſſe* being eaſy, diſſolute, and neceſſitous, *Muſchamp* in conjunction with a couſin of his, who had got another unreaſonable bargain from the earl, which had been ſet aſide by this Court, had beſet the earl: and therefore after ſome days conſideration, he decreed that *Muſchamp* ſhould receive no more than 300l. and intereſt.

After this *Muſchamp* obtained a rehearing, when the Lord *Keeper* declared he was fully ſatisfied with the decree, and that if he were to die preſently he would make it, and ſo confirmed it. *Vere Eſſex*, earl of *Ardglaſſe*, againſt *Henry Muſchamp*, *Chancery*. 1 *Vernon's Reports*, 237, *April* 1684.

About a year after the above decree, the earl of *Ardglaſſe* applied for ſimilar relief againſt *George Pitt*, Eſq; (who by the agency of *Muſchamp* obtained for 300l. the like grant of 300l. a year from earl *Thomas*, drawn exactly *mutatis mutandis* by *Muſchamp*'s grant). Mr. *Pitt* inſiſted that he did not tranſact that affair with the earl himſelf, but being told by *Muſchamp*, that ſuch a bargain might be had, left it to him to deal therein between them; and pretended utter ignorance of the earl's ſtate of life, or condition of health, when the bargain was made, ſo that he was innocent and a fair purchaſer.

The Lord Chancellor *Jefferys* ſaid, That inaſmuch as it appeared that *Muſchamp* had been Mr. *Pitt*'s broker in other unreaſonable

unreaſonable bargains, it was not to be believed that Mr. *Pitt* would make this bargain without inquiry, and knowledge of the condition of the man he dealt withal; and that therefore Mr. *Pitt*'s pretence of not perſonally knowing the earl, or not treating with him, was not only a further evidence of the fraud; but that he was conſcious he ſhould be queſtioned, and pretended *that* ignorance the better to excuſe it; and *fraus eſt celare fraudem*: decreed as in the former caſe, 300l. and intereſt only to be paid to *Pitt*. *Vere Eſſex*, earl of *Ardglaſſe* againſt *George Pitt*, Eſq; *Chancery*. *Vernon's Reports*, 240, A. D. 1685.

John Paignon lent to *George Heathcote*, Eſq; 100l. on a bond. Soon after *Heathcote*, (being then thirty years old, but occaſionally afflicted with the gout) agreed to ſell *Paignon* an annuity of 50l. for the life of *Heathcote*, for the ſum of 200l. to be ſecured by bond and judgment, together with an aſſignment of *Heathcote*'s ſalary as a Commiſſioner of the Tax-Office. The writings were accordingly executed and the purchaſe money paid. The bond debt of 100l. was not paid by *Heathcote* until *Paignon* died; when *Heathcote* immediately diſcharged it; and then applied to the Court of Chancery to redeem himſelf from the annuity of 50l. a year on payment of 200l. and intereſt, to Mrs. *Paignon* the widow and repreſentative of *Paignon*.

On the third day of *November* 1784, the cauſe came to be heard before the Maſter of the Rolls, who referred it to a Maſter in Chancery, to inquire 1. What was the value of the annuity on the day on which it was purchaſed. 2. What was the market price, all circumſtances of *Heathcote*'s ſtate of health being conſidered.

The Maſter reported, that he had been informed that the annuity was worth ten years purchaſe, but that the market price was about ſix. Whereupon the Maſter of the Rolls declared he was of opinion, that *John Paignon* deceaſed, the late purchaſer of the annuity of 50l. a year, for the life of *George Heathcote*, for 200l. taking advantage of his diſtreſs, purchaſed the ſame under the market price, and that therefore ſuch purchaſe ought to be ſet aſide, and decreed the ſame accordingly; and referred it to the ſaid Maſter, to compute intereſt, at the rate of 5l. *per cent. per annum*, on the ſum of 200l. advanced by *Paignon* to *Heathcote* for the purchaſe of the annuity.

Mrs. *Paignon*, the widow, conceiving herſelf aggrieved by this decree, appealed to the Lord Chancellor.

Mr. *Scott*, Mr. *Graham*, and Mr. *Cooke*, in behalf of Mrs. *Paignon*.—This is an appeal from the Rolls. The bill was filed, to be let in to redeem a bond and warrant of attorney, for ſecuring an annuity. The bill ſtated that *Heathcote* being in diſtreſs, applied to *Paignon* for the loan of 200l. that he refuſed to lend it, unleſs upon the grant of an annuity; that *Heathcote* objected to the terms, and that it was agreed that *Heathcote* ſhould be at liberty to redeem, but that agreement was not made part of the bargain: but of theſe facts, though ſtated, there is no evidence. The only evidence is, that *Heathcote* was about thirty, that he had no malady but the gout, and that his life was inſured for about 5l. The Maſter of the Rolls, in giving judgment in the cauſe, propounded two queſtions: 1. What was the value of the annuity, under the circumſtances of the caſe? 2. What was the market price of ſuch an annuity?—In the Maſter's report, he only recited the evidence given before him, but did not report an opinion. With reſpect to the market price; indeed, this is not properly the object of a market price. It is like a jewel, a horſe, or a picture, and bears a price according to the opinion of the parties, the ſale is therefore not to be ſet aſide without intrinſic marks of fraud; the value of ſuch an annuity, is much reduced, by its being for the life of another, and by the tranſaction being diſreputable. But it was argued before the Maſter, that, being inſured, it amounted to a certainty, but this is not ſo. The precarioufneſs of the inſurer's ſecurity, which may fail; the reſervations in the policy, as to quitting the bounds of *Europe*; the poſſibility of the party's deſtroying himſelf, &c. muſt be taken into conſideration, and will very much reduce the value. Between the ages of thirty and forty, no man can get more than ſix year's purchaſe for an annuity for his own life; if he has any malady, it will reduce the value to five year's purchaſe. The inadequacy here, was as five to four, an inadequacy not ſufficient to reſcind the contract. Inadequacy of price, can only be uſed, as a mark of fraud and deluſion; but here *Heathcote* has precluded himſelf from complaining of deluſion. He has only ſtated that he was to be admitted to redeem, and that that agreement was admitted in the contract. His bill expreſsly excludes deluſion; for it ſtates that he ſaw the inadequacy, and choſe to act under it. Where there is no deluſion, the mere diſtreſs of the party (which in the preſent caſe was merely that of every imprudent man), or a mere inadequacy of price, will not reſcind any perſonal contract, *Willis* againſt *Jernegan*, *Stanhope* againſt *Cope*, *Baldwin*

Baldwin againſt *Rochford*. In the preſent caſe, it will be important to conſider whether the Court can interfere in ſuch a contract, made with full knowledge: 1. Whether it is enabled by any precedent. 2. Whether it is ſo by any principle. The firſt caſe in the books, *Waller* againſt *Dalt*, was, the caſe of a young man, employing a corrupt agent. Lord *Nottingham* relieved, on the ground of a groſs cheat.

In *Barny* againſt *Beak*, though very ſtrongly circumſtanced, the wines, &c. being merely a method to raiſe money upon a *poſt obit*, Lord *North* reverſed the decree, in favour of the plaintiff. The decree of reverſal was reverſed by Lord *Jefferys* in 1686. *Batty* againſt *Lloyd*, intervened; there the Lord *Keeper* refuſed to ſet aſide the bargain. In *Berney* againſt *Pitt*, Lord *Jefferys* relieved. *Twiſleton* againſt *Griffith*, was the caſe of a young man dealing for his expectancies; both in that caſe, and *Berney* againſt *Pitt*, the tranſactions were very fraudulent.

The Court has gone into a ſound principle in ſetting aſide tranſactions with heirs. The principle was expreſsly laid down in *Twiſleton* againſt *Griffith*; it has been acted upon in *Nott* againſt *Hill*. There are other caſes which have proceeded upon other grounds than the caſes of heirs, ſuch as the earl of *Ardglaſſe* againſt *Muſchamp*, and earl of *Ardglaſſe* againſt *Pitt*, which were both caſes of groſs fraud; *James* againſt *Oades*, which was a clear colourable caſe of uſury, and was the ſame point as aroſe in *Beſſanquet* againſt *Daſhwood*, *Zouch* againſt *Swain*, and *Herne* againſt *Meares*; both turned on groſs fraud. In *Clarkſon* againſt *Hanway*, the weakneſs of the party was taken as a circumſtance of fraud. In *Oſmond* againſt *Fitzroy*, the circumſtances amounted to fraud. *Wiſeman* againſt *Beake*, ſhews that no great regard is ſhewn to the age of the parties. In Sir *Thomas Meers*'s caſe, it was to make intereſt principal; Lord *Harcourt* ſet aſide the contract.

What is the reſult of theſe caſes, in point of principle? 1. That the Court will effectually prevent and reſcind the contract, where it is uſurious; 2. That it will not do ſo in all caſes of fraud: but it cannot be inferred from hence, that it will do ſo where there is no fraud: 3. In caſes where a young man is dealing for his expectancies, they will carry the principle to the extent of moral obligations; in other caſes it cannot hold. Courts of equity have no juriſdiction to enforce common honeſty; their juriſdiction is confined to caſes where fraud is an ingredient. It will appear from the caſe of Lord *Cheſterfield* againſt *Janſſen*, what the Court will treat as fraud.

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Lord *Hardwicke* in giving judgment conſiders four ſpecies of fraud: 1. Actual fraud ariſing from facts and circumſtances of impoſition; 2. Fraud apparent from the intrinſic nature and ſubject of the bargain itſelf. The third kind is that which may be preſumed from the circumſtances and conditions of the perſons contracting, eſtabliſhed by the Court in order to prevent ſurreptitious advantages of the weakneſſes or neceſſities of another. The fourth ſpecies is out of the preſent caſe. If the arrangement of Lord *Hardwicke* is to be looked to in the preſent caſe, it muſt be referred to the third ſpecies of fraud, that preſumed from the circumſtances and conditions of the perſons contracting. It is impoſſible that the Court can look upon any common degree of weakneſs as ſufficient to raiſe ſuch a preſumption. The mere making a bad bargain is not the proof of the neceſſity of the party. An annuity may be bought at any price, ſo it be not the cover of a loan. No act of parliament regulates the rate of intereſt to be made by the grantee. Money is left, as to this ſubject, to find its own value. *Richards* againſt *Brown*.

Caſes of very urgent diſtreſs might be put, which would raiſe the preſumption of the impoſition, but it muſt be a diſtreſs that deſtroys free agency. There is no evidence in this caſe of peculiar diſtreſs. So in caſes of want of intellects, if the contract was ſuch as no man in his ſenſes could enter into, that might be ſufficient to raiſe the preſumption. But mere inadequacy of price, without theſe circumſtances, is not ſufficient. In the *Roman Law Digeſt*, l. 4. tit. 4. *law*. 16; it is ſaid, *In pretio emptionis et venditionis naturaliter licere contrahentibus ſe circumvenire*; but in the caſe of land, if the price was leſs than half, the ſale might be reſcinded, *cod*. l. 4. *tit*. 4. l. 2. *Minus autem pretium videtur, ſi nec dimidia pars viri pretii ſoluta ſit*. But its being void was in behalf of the ſeller only, not the buyer: the buying under half the value was the mark of fraud. In the preſent caſe there are no marks of fraud, no pretence that the value was not as well known to the ſeller as the buyer. The inequality here is ſuch as might take place in the common tranſactions of life, and undoubtedly no caſe has gone hitherto ſo far as the Court is called upon to do in the preſent. If the inadequacy alone could be a ground, an iſſue might be directed to try whether it was ſuch an inadequacy, which would be quite new, no ſuch iſſue having ever been directed. With reſpect to the ratification of the contract, *Heathcote* paid the annuity during the life of *Paignon*, and down to the year 1782. There was a caſe

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at the *Cockpit* ſome time ſince, where the whole turned upon ratification, the circumſtance being unchanged.

Lord Chancellor. If the Court ſhould take ſuch a ground as to reſt the caſe upon the market price, every tranſaction of this kind would come into a court of equity. If mere inadequacy is the ground, it ſhould ſeem that it was ſcarcely ſufficient; but there is a difference between that and evidence ariſing from inadequacy. If there is ſuch inadequacy as to ſhew the perſon did not underſtand the bargain he made, or was ſo oppreſſed that he was glad to make it, knowing the inadequacy, it will ſhew a command over him which will amount to fraud. If the tranſaction be ſuch as marks overreaching on one ſide, and imbecility on the other, it puts the parties in ſuch a ſituation, as to ſhew that it could not have taken place without ſuperior power on one ſide over the other. The buſineſs of a court of equity is certainly not ſo much to make people honeſt, as to obviate the inconveniencies of diſhoneſty. Here is no evidence of diſtreſs, nothing but the inadequacy of the value; and if that could be made the rule, the leaſt circumſtance which varied the next caſe which occurred might make the difference.

In behalf of *George Heathcote* it was argued by Mr. *Holliſt* and Mr. *Stratford*, that the circumſtances ſhew the loan and the purchaſe of the annuity to be all one tranſaction. The application was for 300l. *Heathcote* obtained one by way of loan; the other *Paignon* would not advance without an annuity. The price given certainly was a very ſmall one; and if inadequacy be a ground for ſetting any tranſaction aſide, that, with the circumſtance of *Paignon*'s knowing that he could inſure the life at one tenth, where it makes a difference in the price of one fifth, is a ſtrong evidence of his taking advantage of the plaintiff.

The Maſter's report is deciſive as to the value, and the inequality of that to the price given muſt be inferred. Inadequacy has been relied on as a ground in many of theſe caſes, as in *Gwynne* againſt *Heaton*, *Ardglaſſe* againſt *Muſchamp*, and *Ardglaſſe* againſt *Pitt*; ſo alſo in *Twiſleton* againſt *Griffith*. *Herne* againſt *Meeres* is a very important caſe on this ſubject. As taken from the regiſter's book, it appears that the ſale was at leſs than five year's purchaſe. It was ſet aſide, and Sir *Thomas Meeres* decreed to be a mere mortgagee.

In the preſent caſe, the purchaſe was conſiderably leſs than half the value.

Long ago it was a uſual way of evading the ſtatute of uſury, to raiſe money by grants of annuities, upon a num-

ber of contingencies. In *James* againſt *Oades*, 40l. *per annum*, for eight years, for 200l. was ſet aſide. Annuities at that time, had ſubſiſted but a ſhort time; they firſt began in Lord *Harcourt*'s time. In *Stanhope* againſt *Cope*, they were annuities at eight year's purchaſe; upon a bill to redeem, Lord *Hardwicke* would have ſet the tranſaction aſide, but the caſe was compromiſed. *Lawley* againſt *Hooper*, goes the whole length of the preſent caſe. In Lord *Carysfort* againſt *Cartwright*, Lord *Carysfort*, in 1763, being then forty-ſeven years old, ſent for *Cartwright*, and propoſed to him, to ſell an annuity of 100l. upon his own life, at ſix year's purchaſe; *Cartwright* aſked what was the ſecurity? Lord *Carysfort* propoſed his eſtate in *Ireland*. Afterwards, Lord *Carysfort* applied for double the ſum. On the 19th of *December*, the deeds were executed, but the annuity was to take place from the *July* preceding, when they bore date. *Cartwright* ſtopt two years annuity out of the payment he was to make, as a ſecurity, and alſo 50l. for the expences, by Lord *Carysfort*'s deſire. There was alſo another grant, of an annuity of 100l. in which Lady *Carysfort* joined, as it was to affect her ſubſequent eſtate for life. The Court decreed, as between Lord *Carysfort* and *Cartwright*, the deeds ſhould be ſet aſide, and that *Cartwright* had taken advantage of his diſtreſs. There Lord *Carysfort* was forty-ſeven years old; his rent-charge was not worth above ſeventeen year's purchaſe. In this caſe, *Heathcote* was only thirty. In *Berney* againſt *Pitt*, the plaintiff proceeded on practice, but none was proved. In *Stanhope* againſt *Cope*, there were no circumſtances to ſhew diſtreſs; as to confirmation by *Heathcote*, there was none, but payment of the annuity, whilſt he was debtor on the bond for 100l; as ſoon as that was paid off, he filed his bill. The doctrine cited from the civil law, if it is at all material, makes in our favour, as, in this caſe, half the value has not been given. From the whole of the caſe, it muſt be manifeſt, that *Heathcote* was diſtreſſed, and, that *Paigne* took advantage of it, which was the motive which induced the Maſter of the Rolls to make this decree, than which there never was one pronounced with more pointed deciſion; for he ſaid, he was perfectly ſatisfied, that the plaintiff had been groſsly impoſed upon, and had ſold an annuity for four year's purchaſe, for which an honeſt man would have given him ten, and even an uſurer ſix; and, "that where there were principles, he was not in want of precedents: the caſe of young heirs had made a beginning: he was not afraid of adding men in diſtreſs to the liſt." The circumſtances of

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men being in diſtreſs, has been a principle relied upon in many of the caſes; it has been taken notice of in ſome caſes at law. In the caſe of *Aſtly* againſt *Reynolds*, with reſpect to goods pawned, the party being in diſtreſs, was conſidered as incompetent to act; and Mr. Juſtice *Burnett* has made it one of the caſes, in which the Court relieves, "where the bargain is ſo lucrative, and the perſon under neceſſity, ſo that the judgment of the Court has been, that neceſſity alone could induce him to make the contract, there has been relief."

Mr. *Scott* in reply. In this caſe, a party dealing throughout the whole tranſaction as for an annuity, now comes to pray it may be conſidered as a loan, ſo that, if *Heathcote* had died, *Paignon* muſt have loſt his money, as an annuity: and if he ſurvived, the tranſaction muſt be cut down as a loan; this at leaſt ſhould have protected Mrs. *Paignon*, who takes this as deviſee for life, and is an executrix, from the payment of the coſts. I lay out of conſideration all the caſes of young heirs and marriage-brokage bonds, where a public policy interferes; the parties in this caſe are not in any of thoſe ſituations: the bill is not a bill to reſcind the tranſaction, but to eſtabliſh what it ſtates to have been the original contract, that they ſhould be at liberty to redeem; the ſuggeſtion that it was a loan, therefore, cannot ſtand with the allegations of the bill. It has been argued on the ſimple ground, whether there is in the circumſtances of the caſe, ſufficient to enable a Court of equity to ſet it aſide. As to the caſe of the pledge, the ground on which it was decided, is different. It was in the hands of a perſon who was bound by law to reſtore it on payment of a certain ſum: the action proceeded on a principle that it ſhould not be lawful for him to vary thoſe terms. The term "Market Price" certainly meant ſomething which the Maſter of the Rolls thought certain. All that the Maſter's report proceeds upon is the opinion of third perſons: if ſuch opinions, given without oath, are to influence the judgment of the Court, property will be very uncertain. Although the value may be calculated at the ſum ſtated, probably the annuity, at public auction, might not have brought five year's purchaſe; this is the fact I wiſh to have aſcertained, by way of coming at a market price, and, as to this, the report is ſo uncertain, that it ought to be referred back to the Maſter.

Lord Chancellor Thurlow. Where there has been a loan, and the terms have been ſuch as to ſhew the diſtreſs of the

party, the Court has given relief; here was 23 *per cent.* clear profit, with a certainty of the principal being ſecure.

The ſtatute and the determinations have increaſed the market upon the bargainee. It would have been prudent at firſt, perhaps, to have ſtopped. Now if I declare, that having given but two-fifths of the value for the annuity, ſecured by the inſurance, was taking advantage of his diſtreſs, that will be a proper preface to my affirming the decree, but that will decreaſe the future price of annuities. I cannot ſay, that being at all under the greateſt price that could be obtained, would be a ſufficient reaſon for reſcinding the tranſaction.

The decree of the Maſter of the Rolls was affirmed. *Heathcote*, Eſq. againſt *Paignon* and others, *Chancery*. 2 *Brown's Reports*, 167. A. D. 1787.

Confirmation of Bargains.

HAVING in the preceding pages ſtated various attempts that have been made to evade the ſtatute of uſury, and various inſtances of contracts, which though not uſurious in point of law, are of ſo unreaſonable and unconſcionable a nature as to be reſcinded in a Court of equity: we now come to the remaining queſtion, viz. how far ſuch contracts as the laſt may be ſubſtantial by ſubſequent confirmations of them: and on this point it may be ſaid in general that ſuch contracts will be ſubſtantiated by ſubſequent confirmation, but not unleſs ſuch confirmation be voluntarily and freely made; and without any fraud, impoſition, or procurement.

Wiſeman was entitled to a conſiderable real eſtate, in caſe his uncle died firſt, without iſſue male. He entered into ſeveral contracts with *Beake* for the loan of money, by which he bound himſelf to pay *Beake ten* for *one* in caſe his uncle died without iſſue male, and he ſurvived him. The uncle died without iſſue, and *Wiſeman* to relieve himſelf from the performance of theſe heavy bargains, applied to the Court of Chancery, to be diſcharged on payment of what was really due with intereſt.

On behalf of *Beake* it was argued that this was not the ordinary caſe of ſurpriſing a young heir into a hard bargain. Mr. *Wiſeman* was near *forty* years old, had long been a man in employment, a *Proctor* at *Doctors Commons*, and of experience in the world: and further that *Beake*, ſeveral years after this bargain, underſtanding that the *Chancery* began to relieve

relieve againſt ſuch bargains, adviſed with Serjeant *Philips*, what was fit to be done in the caſe, and by his advice *Beake* applied by bill to the Court of Chancery to compel *Wiſeman* to repay the money he had received with intereſt, or to be foreclоſed from any relief in future, and that *Wiſeman* in anſwer thereto on oath elected to ſtand by his bargain, acknowledging that it was fairly and duly made, and that he would not in future ſeek any relief; and therefore he ought not now, contrary to his own election and oath, to be relieved.

The Court ſaid, when *Wiſeman* had ſpent the money, then a ſpecious offer was made by *Beake* to relinquiſh the bargain, on payment of the money lent and intereſt, which at that time it was impoſſible for *Wiſeman* to do. And the application to the Court of Chancery was only a contrivance to double hatch the cheat. *Wiſeman* was therefore relieved on payment of principal and intereſt only, without coſts, and decreed accordingly. *Wiſeman* v. *Beake*, 2 *Vernon's Reports*, 121, *Feb.* 1690.

Martin was entitled to a legacy of 500l. (left him by his uncle *Mackean*, deceaſed) payable in caſe he ſurvived his aunt *Mackean*, ſhe to have the intereſt of it during her life.

Martin was a young man of about twenty-four years of age, but had led an extravagant life, and had been for ſome time in *Newgate*. Mrs. *Mackean*, his aunt, was about ſixty-four years old; but as to her ſtate of health, there was variety of evidence.

Martin had offered to ſell this contingent legacy of 500l. in caſe he ſhould ſurvive his aunt *Mackean*, to ſeveral perſons, and among others, to his aunt *Mackean* herſelf, but they refuſed to buy it. At length, at his deſire, one *Cole* entered into an agreement with *Martin* for the purchaſe of this contingent legacy. *Cole* was to give for it 100l. to be paid at 5l. *per annum*, at every *Chriſtmas*, with a proviſo, that if *Martin* ſhould ſurvive his aunt *Mackean*, then what ſhould remain due of the 100l. ſhould be paid within a year after her death; but if *Martin* ſhould die within the life-time of Mrs. *Mackean*, then the 5l. *per annum*, to continue payable yearly, as aforeſaid, until the 100l. or what ſhould remain due thereof, ſhould be fully paid to *Martin* or his executors, adminiſtrators, or aſſigns.

Martin went beyond ſea, and hearing that his aunt *Mackean* was dead, returned to *England;* but before his return, and after her death, *Cole* had applied to the Court of Chancery,

Chancery, to compel the executors of Mr. *Mackean*, the uncle deceaſed, to pay him the 500l. legacy, as aſſignee thereof from *Martin*; and the executors controverted the payment, as having been aſſigned by *Martin* to *Cole*, ſo much under the value.

Upon *Martin*'s returning to *London* from beyond ſea, he came to *Cole*'s houſe, telling him he was informed his aunt *Mackean* was dead, and that now the legacy of 500l. which was before contingent, was become abſolute; but that *Martin* was fully ſatisfied with what he had done; and that, if he had not ſold the legacy to the plaintiff *Cole*, he ſhould have diſpoſed of it to ſome other perſon for a leſs price; and being told by *Cole*, that he was at law with the executors of his uncle, for the recovery of the legacy, (they having controverted the payment thereof to him): *Martin* blamed the executors for having refuſed to pay the legacy, ſaying, he would ſpeak to them about it, and that he was willing to do any thing further to confirm the aſſignment which he had before made to *Cole*.

Whereupon, ſome ſhort time afterwards, a deed of confirmation of the former aſſignment was prepared by *Cole*, and read over to *Martin*. At the ſame time the bill brought by *Cole* for the legacy againſt the executors, and their anſwer to the bill controverting the payment thereof, was read to *Martin*, and he being thus fully appriſed of every thing, executed a deed of confirmation of the former aſſignment to *Cole*. After this, *Martin* himſelf applied to the Court of Chancery to be relieved againſt the aſſignment, and the deed of confirmation; upon a full hearing whereof, it was at firſt decreed by the Lord *King*, and afterwards upon a re-hearing that decree affirmed by the Lord *Talbot*, that there being no fraud in obtaining the firſt aſſignment, which was at a ſubſequent time ſo deliberately confirmed, therefore *Martin* could not be relieved, and ought to be bound thereby.

It was objected, that here was a neceſſitous man ſelling this 500l. legacy for what was not near the value, for leſs than 100l. nay, for the intereſt only of 100l. payable for twenty years together; and ſeveral caſes were cited, where reverſions were bought on contingencies, to be void, if the heir ſhould die in the life-time of the anceſtor, all which purchaſes were ſet aſide by the Court; that as the original bargain was unreaſonable, and fraud manifeſtly appeared upon the face of it, ſo this fraud, with which it at firſt began, accompanied it throughout, and was ſufficient to

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ſpoil the whole tranſaction. *Quod ab initio non valet, tractu temporis non convaleſcet.*

But Lord *Talbot* obſerved, that all theſe caſes of heirs were immaterial to this point; for that the policy of the nation, to prevent what was a growing miſchief to ancient families, that of ſeducing an heir apparent from a dependance on his anceſtor, who probably would have ſupported him, and, by feeding his extravagancies, tempting him in his father's life-time, to ſell the reverſion of his eſtate, which was ſettled upon him; foraſmuch as this tended to the manifeſt ruin of families; therefore the policy of the nation thought fit (though it at firſt prevailed with ſome difficulty) to put a ſtop to ſo miſchievous a practice, by ſetting aſide all theſe bargains with young heirs, for reverſions; but that in this caſe here was no heir concerned, and as it was in the power of *Martin*, when he returned from beyond ſea, was informed of his aunt's death, and that the legacy of 500l. was become abſolute, to confirm this firſt aſſignment, ſo he had done it.

His lordſhip admitted, that had all depended upon the firſt aſſignment, he would have ſet it aſide, as being an unreaſonable advantage taken of a neceſſitous man, but ſeeing *Martin* was afterwards fully appriſed of every thing, had the executor's anſwer read to him, and yet choſe to execute a deed of confirmation of his former aſſignment: and ſince not the leaſt fraud or ſurpriſe had appeared on the part of *Cole*, it was, he ſaid, too much for any Court to ſet all this aſide. *Cole* v. *Gibbons*, 3 *Peere Williams's Reports*, 290. 1734.

Thomas Baugh was in expectation of an eſtate of about 300l. value, after the death of *Rowland Baugh*, who was about ſeventy-two years old, afflicted with the gout and a rupture, his life not worth above one year's purchaſe; being in neceſſitous circumſtances, he, on the 21ſt of *October*, 1739, in conſideration of 150l. to be paid to him by *Price* within a year, and of an houſe in *Priſtein*, worth 20l. to be conveyed to *Thomas Baugh*, he agreed to convey to *Price* this eſtate, ſubjected to the eſtate for his father's life; ſoon after the ſigning the articles, *Thomas Baugh* was deſirous of being off the bargain, but *Price* would not agree to it; and on the 3d of *November*, 1739, a conveyance was prepared by *Price*, (who was an attorney) and *Thomas Baugh* executed it that day at his houſe, when nobody beſides *Price*, his ſon, and another perſon, were preſent.

Old *Rowland Baugh* died the 8th of *July*, 1740, having lived no more than nine months after *Thomas* had made this conveyance

conveyance to *Price*, whereupon *Thomas* writes a letter to *Price*, acquainting him with his father's death, and tells him that he ſhall act in all reſpects agreeable to his wiſhes; in another letter he tells *Price* he ſhall always act juſtly, and ſays that *Price* has got a good bargain of him, that he might afford to give him a *buck*, but ſays he will not touch one without *Price*'s conſent.

After this, *Thomas Baugh* filed his bill in Chancery to ſet aſide theſe articles and conveyance, and to be relieved; the defendant *Price* put in his anſwer thereto, and denied the fraud charged.

But *Thomas Baugh* being at this time indebted to *Price* in 100l. which he was to give *Price* with his ſon as clerk to him, was threatened to be ſued for it, and by other arts of *Price*, was intimidated from proceeding farther in Chancery; nay, *Price* was not content with *Thomas B.*'s ſtopping the proceeding in Chancery, but inſiſted upon ſome ſatisfaction to be made to him for the aſperſions he pretended had been caſt on him by that bill, and accordingly prevails upon *Thomas B.* to execute a deed dated *October*, 1741, reciting the proceedings in Chancery, and that the purchaſe was a fair one, and *Thomas B.* thereby confirms and releaſes the eſtate to *Price*. Soon afterwards, *Thomas B.* and *Price*, with the aſſiſtance and intermediation of one Doctor *Thomas* (to whom *Thomas B.* applied) ſettled all accounts, and *Thomas Baugh* ſeemed ſo well ſatisfied that he thanked Doctor *Thomas* (who appears as a common friend to both) for his kindneſs. In 1746 *Thomas Baugh* died, leaving a ſon and heir, the preſent plaintiff, who ſoon after preferred this bill to be relieved upon paying the purchaſe-money and intereſt to *Price*, and all neceſſary and permanent repairs.

At the hearing of the cauſe, which laſted eight days, two queſtions were made; 1ſt. whether the articles and conveyance were obtained by *fraud and impoſition:* and 2dly. if they were, whether *Thomas Baugh* by any ſubſequent act had purged that *fraud* or *impoſition*. And after time taken to conſider, the Court were decidedly of opinion, in favour of *Baugh* on both points.

There can be no doubt at all but as this caſe ſtood originally, and at the time it was depending in Chancery, *that* Court would have relieved. Here is a ſon who is a remainder-man in tail (in the life of his father, old and infirm) not knowing the value of the eſtate, trafficking with an *attorney*, who had tranſacted buſineſs for his father and him twenty-ſix years, had ſeen the family ſettlement, and is taking advantage of the ſon's neceſſitous circumſtan-

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ces, and purchaſing his eſtate for half the real value of it. *Price* draws all the writings himſelf, *Thomas B.* has no draught or copy, nor any attorney or council concerned for him; here is no valuation made of the eſtate, the whole tranſaction kept a ſecret from old *Rowland; Price* ſeems to have made *Thomas B.* do juſt what he pleaſed.

The 2d queſtion is, whether the ſubſequent acts of *Thomas B.* will bar his ſon the plaintiff; and I am of opinion they will not, and that he ought to be relieved.

It is ſtrongly inſiſted upon for *Price*, that the letters from *Thomas B.* to *Price*, ſoon after his father's death, ſhew that he thought the bargain a fair one; but to this it is rightly anſwered, that they were written ſoon after his father's death, before his eyes were open, and before he knew the real value of the eſtate; for he not long afterwards preferred his bill in Chancery, and I think the arts and threats uſed by *Price*, to ſtop that ſuit, were as fraudulent as the original bargain, and the recital in the releaſe executed thereupon is falſe, for the bargain was a very unfair one, and *ſuppreſſio veri*, or *ſuggeſtio falſi*, have always been held ſufficient to ſet aſide a releaſe, 1 *Vern.* 20[a]. *Thomas Baugh* was made to think that his ſuit was without any good foundation, and to fear that he ſhould be liable to coſts, and if the purchaſe was at firſt fair wanted no confirmation; *Thomas B.* was never fully apprized of his right, but was continued in a ſtate of deluſion by *Price* till his death, who impoſed upon him in every tranſaction.

It was further objected for *Price*, that *Thomas B.* all his life ſtood by and ſaw *Price* laying out great ſums of money in repairs and ornamental additions, &c. but to this it is rightly anſwered that *Thomas B.*'s acquieſcences were founded upon

[a] The caſe here referred to is *Jervois* and *Duke*, in which Sir *Edward Duke* by his will deviſed a legacy of 2000l. to one of his daughters; but if ſhe married one *Bacon*, that then the legacy ſhould be void. She having before her father's death married the ſaid *Bacon*, takes advice upon the will, and is adviſed that the legacy was void by reaſon of her having married *Bacon*: her brother pays her 800l. and ſhe releaſes her legacy.

She now filed her bill to have this releaſe ſet aſide, and her legacy made good to her, pretending ſhe was circumvented in this releaſe, her brother telling her ſhe had no legacy given her by her father's will, but was raiſed out of it; and that he ſuppreſſed the will, and did not prove it till after ſuch time as he had obtained this releaſe.

To which it was ſaid by the Lord Chancellor, that it is the conſtant rule, where there is either *ſuppreſſio veri*, or *ſuggeſtio falſi*, the releaſe ſhall be avoided.

Then they went on to prove that Sir *E. Duke* in his life-time did actually

upon a miſtake into which *Price* had led him. I think *Price* ſhould be allowed for all neceſſary repairs.

The caſe of *Cole* v. *Gibbons*, 3 *Wms.* 290. was ſtrongly relied upon by *Price*'s counſel; but that caſe differs very materially from this; that was not the caſe of an heir in the life of his father, nor of a remainder-man or reverſioner, nor was there any fraud in the original bargain in that caſe upon which Lord *Talbot* laid great ſtreſs, the party there confirmed the bargain when he was fully apprized of every thing: but in this caſe at bar here is fraud in every tranſaction, appearing by written evidences, which cannot err, for *Thomas B.* was deluded from firſt to laſt: and the caſe of Lord *Cheſterfield* and *Janſſen* ſtands quite clear of fraud, ſo nothing like this caſe.

It is the policy of the nation that ſuch bargains as this ſhould not ſtand; and if the Courts of juſtice were to hold them good, it would be to encourage extravagance and diſobedience in young heirs on one hand, and avarice, fraud and impoſition on the other; and therefore I am of opinion that the articles and deeds ought to be ſet aſide upon *Baugh*'s paying *Price* his principal and intereſt, and that *Price* be allowed for all needful repairs, and that *Baugh* be paid his coſts till this time, and the ſubſequent coſts be reſerved till the coming in of the Maſter's report. *Baugh* v. *Price*, 1 *Wilſ. Reports*, 32. 1752.

In the caſe of the executors of *Spencer* and *Janſſen*, there were three points of conſideration (ſee page 416, 417), 1. Whether the contract was uſurious, which was determined in the negative. 2. Whether it was unconſcionable, which was not decided, becauſe the caſe depended entirely on the third queſtion, which was, Whether *Spencer*'s confirmation of the contract after the contingency, viz. the death of the ducheſs of *Marlborough*, had hap-

actually revoke this will, and declare his daughter ſhould have no ſuch legacy.

And it being fully proved, that the father himſelf had actually revoked this legacy, it was decreed by the Lord Chancellor againſt *Jervois*, ſaying, that where a legacy is deviſed to a woman, upon condition ſhe marry with the conſent of a particular perſon, here, if the legacy be not limited over to another perſon in caſe of her marriage without ſuch conſent, it is only *in terrorem*, and though ſhe marry without conſent, it doth not avoid the legacy. But here in this caſe the father himſelf having actually revoked the legacy upon his daughter's diſobedience, the father himſelf has in this caſe been Chancellor, and that with equity too: ſuch an example of preſumptuous diſobedience highly meriting ſuch a puniſhment; ſhe being only prohibited to one man by name, and nothing in the whole fair garden of *Eden* would ſerve her turn but this *forbidden fruit*.

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pened, by giving a new ſecurity for the payment of the money by paying part thereof, and expreſſing himſelf ſatisfied with the bargain, would not ſubſtantiate the contract, even had it been ſuch an one as the Court of Chancery would otherwiſe have relieved againſt.

On this laſt point the opinions of the judges were delivered as follow:

Mr. *J. Burnet.* There is no caſe of a contract ſo confirmed, which was not illegal, (but ſuch as the Court would have relieved in its original inſtance) where the Court has relieved againſt its confirmation; unleſs obtained by fraud and oppreſſion, and then it has been conſidered as a continuance of the firſt oppreſſion; of which there are two caſes. Lord *Ardglaſſe* againſt *Muſchamp*, and *Wiſeman* againſt *Beake:* but no reſemblance to the preſent from either. There was no fraud, practice or impoſition, in the original contract or ſubſequent ſecurity: Sir *Abraham Janſſen* was not very preſſing for his money; the ſecurity not being given until a good while after; which ſhews no ſuit or diſtreſs was threatened: but fairly and voluntarily done, and upon intimations received that Sir *Abraham Janſſen* had a doubt, whether he could make good the contract in a Court of equity. *Cole* againſt *Gibbons*, and *Curwin* againſt *Milner* are applicable to the preſent.

As there is nothing therefore to ſet aſide the contract on the foot of uſury within the ſtatutes; and next ſuppoſing it was ſuch as would be ſet aſide, if left to the conſideration of the Court, yet as the party with his eyes open has bound himſelf to execute it, it is too much to ſet it aſide.

Sir *John Strange.* On the third queſtion, I am of opinion, that *Spencer*'s executors are entitled to no relief but muſt pay what remains due of the 10,000l. and the intereſt from the death of the grandmother: and though I have given no opinion upon the former part of the tranſaction, yet I muſt take up this as conſidering *Spencer*'s executors intitled to the relief prayed; as the caſe ſtood on the former agreement. And here it is not improper to take a ſhort view of the different ſituation Mr. *Spencer* appears in 1774, from what he was in 1738. When the firſt bond was given, he was, notwithſtanding a large income, involved in great difficulty for want of money to pay creditors, caſting about every way for a preſent ſupply; and ſuffering dangerous ſchemes to be privately hawked about; fearful leſt it ſhould come to his grandmother's ears, that he was mortgaging his expectations from her. It is not very clear, who took the firſt ſtep towards the new engagement after her death; the bond was not given until nearly three months

months afterwards, though dated the next day after, in order that it might carry intereſt from thence. But ſuppoſing Sir *Abraham Janſſen* had called upon Mr. *Spencer* for his money after the 31ſt of *October*, (which, from his genteel behavour in other parts I can hardly think, he did) yet there is no circumſtance of force on Mr. *Spencer;* and the ſecurity then ſtanding out againſt him, was only a bond for payment of money; not a judgment, on which immediate execution could be ſued; which bond would have given him time enough to have turned himſelf about, before he would be under a neceſſity to be expoſed to an execution. It appears to be his fixt deſign after her death to pay off the whole as faſt as he could; and that with a preference to Sir *Abraham Janſſen*, who, he ſaid, had treated him like a gentleman. Sir *Abraham Janſſen* declared, he would not preſs him for the money, although he ſhould be glad to have it; and Mr. *Spencer* executed the bond and warrant of attorney freely and voluntarily, and well pleaſed therewith. It may be ſaid, that all this proceeded from his not being apprized, that there could be relief in equity againſt the firſt bond. In *Cole* againſt *Gibbons* the bill for relief and the anſwer were both read to the party, and yet the aſſignment was confirmed; which circumſtance, greatly weighing with Lord *Talbot*, is not wanting in the preſent caſe: it is what Sir *Abraham Janſſen* may make uſe of on his part, and it will be evidence for him, viz. that he anſwered to the manager of Mr. *Spencer*, that he doubted, whether the ſecurity would be good, and therefore only deſired a note or memorandum; ſo that from this doubt of Sir *Abraham Janſſen*, Mr. *Spencer* was apprized of the probability of relief, he had, if he applied to a Court of equity; which ſhews, he acted with his eyes open in this article of confirmation; that it was not a ſudden, but deliberate act, and agreeable to that frame of mind he continued unto his death, as appears from his ſubſequent letters.

Contracts of poſt obits are to be diſcouraged: and though the relief is not granted in the preſent caſe, yet ſhould the Court hold a ſtrict hand over theſe ſort of contracts. How this would be in the caſe of a young heir under parental authority, I do not ſay. It may be improper to forejudge ſuch a caſe; but inconvenience there can be none in the determination of the caſe. Yet in giving my opinion and advice in this very particular caſe againſt relieving Mr. *John Spencer*'s eſtate, I am far from blaming his executors, who are truſtees for the infant, for ſubmitting the caſe to

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the conſideration of the Court; which I think very rightly done.

Lord Chancellor. As to the laſt queſtion of the ſubſequent acts of Mr. *Spencer:* this is the point on which the determination of this caſe will depend, and I intirely agree with the opinion delivered already. Had the firſt bond been void by the ſtatute of uſury, no new engagements would have made it better: the original would have infected it. But if a man is fully informed with his eyes open, he may fairly releaſe and come to a new agreement and bar himſelf of relief which he had in this Court. The material inquiry is, whether this was done after full information, freely, without compulſion, &c? But upon the beſt conſideration of the evidence it appears to be ſo done, and with fairneſs. Firſt, The condition of the neceſſity of Mr. *Spencer* was over, for though he had no power over the capital of this acceſſion of eſtate, yet it was ſo great a one, that little more than one third of a year's income would have paid off the whole. If that then be a ſtate of neceſſity, how far ſhall it be carried? Then, the ſtate of expectancy was over by the death of the ducheſs: and alſo the danger of her coming to the knowledge of his conduct and circumſtances, and his fear of offending her, which was the principal reſtraint upon him: ſo that there was no anceſtor or relation left, upon whom any deceit could be committed in conſequence of any new agreement: and it appears, that before this new bond he had ſufficient notice, that he had a chance at leaſt that he might have relief in equity, from Sir *Abraham Janſſen*'s own declaration to him of his doubt whether it would be good. Laſtly, There was no impediment againſt his ſeeking relief by diſcloſing the whole caſe at that time in a Court of juſtice. Under theſe circumſtances was the new engagement, without any fraud, contrivance or ſurprize to draw him in; which operates more ſtrongly than the deed of confirmation in *Cole* againſt *Gibbons*, that it is too much to ſet it aſide. The only difference to diſtinguiſh that from this caſe was, that there the releaſor was not in the power of the releaſee; here Mr. *Spencer* was debtor, and his creditor might immediately have diſtreſſed him by an action: but the anſwer is, there was neither an attempt or threat to bring an action. It is objected farther for *Spencer*'s executors, that *Cole* againſt *Gibbons* was a ſingle caſe, and there are ſeveral precedents, in which ſuch new ſecurity and ſubſequent tranſactions was not ſufficient to give a ſanction to a demand of this kind: as in Lord *Ardglaſſe* againſt *Muſchamp:* but the circumſtances

ſtances there ſhew it not to be at all applicable: then the confirmation in *Wiſeman* againſt *Beak* was ſtill more extraordinary; and that was a very extraordinary invention of Serjeant *Phillips* of a bill to be forecloſed againſt a relief in equity. In both theſe caſes the original tranſaction was groſsly fraudulent; but I have only ſhewn it here to be a doubtful object of relief in this Court, which ſurely is the moſt proper caſe of all others to put an end to by a new engagement.

On the whole therefore the only relief is that, which I am adviſed to give, againſt the penalty of the laſt bond, the penalty being 10,000l. conditioned to pay 5000l.

The only doubt which could ariſe on this, is as to the coſts; to which Sir *Abraham Janſſen* is not entitled. The plaintiffs in this cauſe, are only executors, they had a probable cauſe of litigating this contract, which is far from deſerving favour, and were in the right to ſubmit it to the judgment of the Court; and it is obſervable that in *Cole* againſt *Gibbons*, which was on this point, the bill was diſmiſſed without coſts, and no coſts given on the bill, but on the contrary deducted. There was indeed in that caſe no penalty, as there is here: but ſtill that does not take away the diſcretion of this Court in reſpect to coſts according to the circumſtances of this caſe: and there are ſeveral caſes of a bond with a penalty diſputed, where, though the coſts at law will undoubtedly follow the demand, yet on the circumſtances coſts in this Court are refuſed.

Therefore let it be referred to the Maſter to take an account of the principal, and intereſt due on the bond of 1744, and the judgment thereon, and to tax Sir *Abraham Janſſen* with his coſts at law, and an account of the money paid by Mr. *Spencer* to him; and let that firſt be applied to diſcharge the intereſt, and then to ſink the principal; and all juſt allowances be made, and on payment to Sir *Abraham* of what is found due, let him deliver up the bond to be cancelled, and acknowledge ſatisfaction on the judgment: but that muſt be at the expence of *Spencer*'s eſtate: and if his executors pay what is found due, let each bear their own coſts in this Court, but otherwiſe let the bill of the executors be diſmiſſed with coſts againſt them. 2 *Veſey's Reports*, 125. 1750.

In the following caſe a money-lender was proſecuted criminally, for not returning a bill he received under the pretence of diſcounting it, and was ſentenced to be tranſported:—it is not altogether inapplicable to the preſent ſubject.

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Mr. *Edwards* wiſhing to get his own note of hand diſcounted, had made application to ſeveral perſons in the diſcounting line of buſineſs for that purpoſe. A few days afterwards, *John Henry Aickles*, a total ſtranger to Mr. *Edwards*, left an addreſs at his lodgings while he was from home, "Mr. *H.* No. 21, *Great Pultney-Street*, from ſix to ſeven in the evening, or from eleven to twelve in the morning." In conſequence of this addreſs, Mr. *Edwards* the next morning called at No. 21, in *Pultney-Street*; and a converſation upon the ſubject of money tranſactions taking place between them, *Aickles* told Mr. *Edwards* that he was in the diſcounting line, and would, whenever he choſe, diſcount a bill for him at the uſual premium of 2½ *per cent. agency*, provided it was drawn upon and accepted by a perſon of known credit and reſponſibility. About three weeks after this interview, Mr. *Edwards* again called upon *Aickles*; but not finding him at home, he ſent his clerk, Mr. *Croxall*, the next day to enquire whether he would diſcount a bill of 100l. accepted by *Richard Wells*, of *Cornhill*; and requeſting that he would call in the city, that he might be fully ſatisfied of its validity. *Aickles* returned with Mr. *Croxall* to the houſe of Mr. *Richard Wells*, where he was ſhewn into a room to Mr. *Edwards*, who aſked him the terms upon which he would diſcount a bill for 100l. provided he approved of it; *Aickles* replied, "Two and a half *per cent. agency*, excluſive of the legal intereſt, for two months." Mr. *Edwards* immediately delivered the bill into his hands, and referred him to Mr. *Richard Wells* the acceptor of it, who was there preſent, to ſatisfy himſelf that it was a genuine acceptance. Mr. *Wells* ſaid the acceptance was his own hand-writing. *Aickles* addreſſing himſelf to Mr. *Edwards* ſaid, "Sir, if you will go with me to the weſt-end of the town, to *Pultney-Street*, I will give you the caſh." Mr. *Edwards* replied, "I cannot conveniently go with you myſelf, but Mr. *Croxall* ſhall attend you, and pay you the 11. 5s. agency and the diſcount, on receiving the 100l." On their departure Mr. *Edwards* whiſpered his clerk not to leave him without receiving the money, nor to loſe ſight of him; promiſing to follow them in half an hour. *Aickles* and Mr. *Croxall* accordingly proceeded together to *Pultney-Street*. When they arrived, Mr. *Croxall* was ſhewn into the parlour, and deſired to wait while he fetched the money; ſaying, "It is only about three ſtreets off, and I ſhall be back in a quarter of an hour." Mr. *Croxall* however followed him down *Pultney-Street*, but in turning the corner of *Brewer-Street* loſt ſight of him.

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He walked backwards and forwards in the ſtreet for a length of time, in hopes of ſeeing him return; but without ſucceſs. During this interval Mr. *Edwards* who had previouſly called at No. 21, *Pultney-Street*, came up to *Croxall*, and they returned to *Aickles*'s lodgings, where they waited three days and three nights in a vain expectation of his return. On the *Saturday* following however, Mr. *Edwards* apprehended him at the houſe of a lady in *Margaret-Street*, where he had that day dined. He expreſſed his ſorrow for what had happened; made ſeveral apologies for his miſconduct; and promiſed to return the bill: but he was carried before a magiſtrate, who committed him "on ſuſpicion of being a common cheat." He was now indicted at the *Old Bailey*, *January* ſeſſion, 1784, and tried before Mr. Juſtice *Heath*, for *ſtealing* a bill of exchange, value 100l. the property of *Samuel Edwards*. It was proved that the bill had been ſeen a few days before the trial, in a ſtate of negociation in the hands of a Mr. *Smith*, and that a *ſubpœna duces tecum* had been ſerved upon him; but he did not appear, nor was the bill produced in evidence.

The counſel for *Aickles* ſubmitted two points to the conſideration of the Court: 1. That the bill itſelf ought to have been produced in evidence. 2. That the facts, admitting them to be true, do not amount to felony.

The firſt point. The bill is proved to be in exiſtence, and it is incumbent on the proſecutor to produce it. He might have taken proper meaſures for this purpoſe before he had proceeded to trial. If the bill had been loſt or deſtroyed, parol teſtimony might perhaps have been admiſſible; but it is a clear and ſettled principle of law, that parol teſtimony cannot be given of any exiſting *written* inſtrument.

Second point. To ſatisfy the definition of larceny as it appears in the works of the moſt diſtinguiſhed writers upon crown law, the *property* muſt be taken from the *poſſeſſion* of another. The taking of the *property* itſelf, after it is ſeparated from the legal poſſeſſion of its original proprietor, can never become a ſubject capable of ſupporting the allegation of larceny, eſpecially if that ſeparation be unaccompanied by thoſe ingredients which furniſh the idea of a felonious intention. The juriſprudence of the country has adopted a diſtinction between thoſe actions which are *animo furandi*, and thoſe which are the conſequence of *artful contrivance*; and on this diſtinction depends the great difference between *felony* and *fraud*. The criterion of a *felonious intention* is where the act of taking is accompanied by ſuch circumſtances

circumſtances as plainly import to have been by *conſtraint* and againſt the inclination of the owner. *Furtum eſt tractatio rei alienæ fraudulenta animo furandi invito illo cujus res illa fuerit*; but where the mind of the owner is beguiled by the means of ſome deceitful practice, and under the influence of that deceit, he conſents, fooliſhly perhaps, but *voluntarily*, to part with his property, it is evidence of a *fraudulent intention*; but whether in this caſe, the *poſſeſſion* accompanies the *delivery* or not, it will be impoſſible to build upon ſuch a foundation the notion of larceny, which requires that the goods ſhall be obtained againſt the owner's conſent. In the preſent caſe, there is ſcarcely evidence even of an intended fraud, much leſs any badge of felony. The priſoner, it is true, firſt introduced himſelf to the knowledge of Mr. *Edwards*, under a pretence of being able to diſcount his note, or to get it diſcounted; for the circumſtance of his requiring a premium for his trouble, implies that he was not to diſcount it himſelf, and it was perfectly immaterial to Mr. *Edwards* by which of theſe means he was to be furniſhed with the money; but whatever might have been his intention at that time, it was never carried into effect. Almoſt a month afterwards, the proſecutor makes an application to the priſoner for his aſſiſtance, and voluntarily delivers the bill into his hands, upon a truſt that he was to receive the money for it. This voluntary delivery gave to the priſoner a free and unreſtrained power over it, and enabled him to part with it to any perſon he pleaſed; and however the non-performance of his promiſe to diſcount it may be conſtrued a *breach of truſt*, or violation of the confidence repoſed in him, it excludes every legal idea of felony. A felonious intention muſt have a certain commencement, evidenced by ſome overt act denoting intention; but there is nothing in this caſe from which it is poſſible to diſcover the point at which felony begins. The poſſeſſion of the note cannot be felony; for he received it by voluntary delivery from the proſecutor. Carrying it home to his lodgings cannot be felony; for to that act the proſecutor conſented. Going out to get it diſcounted cannot be felony; for that act was permitted and aſſented to by Mr. *Croxall*. The getting it diſcounted cannot be felony; for that was the promiſe which the proſecutor relied upon the priſoner to perform. Nor can his neglecting to return either the money or the bill be conſidered as felony; for, admitting that he did in fact receive the money, the ſubſequent converſion of it, preſſed perhaps by the importunity of ſome other creditor, cannot be felony;

as it was never in the profecutor's *poſſeſſion*, and therefore cannot be ſaid to have been taken *from him*. Lord *Dyer*, page 5, ſays, "If a man deliver an obligation to another to receive the money due upon it, and he receives the money due upon it, and goeth away therewith, or doth convert it to his own uſe, it is not felony. So alſo if a perſon deliver wares or cattle to another to ſell, and he ſelleth them and runs away with the money." And Sir *William Staundforde*, a very accurate writer upon crown law, is of opinion, that "if a man deliver to another a bag of money, for the purpoſe of paying it to a creditor, or of purchaſing any particular article, and he goes away with it, it is not felony, *eo que il eſt hors de poſſeſſion*." Lord *Hale* alſo ſays, "that if A. come to B. and by a *falſe meſſage* or *token* receive money of him and carry it away, it is no felony, but a cheat, puniſhable by indictment at common law, or upon the ſtatute 33 *Hen.* VIII. c. 1."

Theſe objections were anſwered by counſel on the part of the crown.

Firſt point. It is proved that the bill is in the hands of Mr. *Smith*, who has been ſerved with a *ſubpœna* to produce it; and as he has refuſed to comply, parol teſtimony may be given of its contents, if it had been in the priſoner's poſſeſſion, the next beſt evidence to the bill itſelf would have been admiſſible; for as a priſoner cannot be compelled, or even legally required, to produce any evidence which may operate againſt himſelf, the next beſt evidence which it is in the power of a proſecutor to produce, is always admitted; and in the preſent caſe, the poſſeſſion of Mr. *Smith* is to be conſidered as the poſſeſſion of the priſoner. The principle therefore, that parol teſtimony cannot be given of a written inſtrument, unleſs there is a ſtrong preſumption previouſly raiſed of its being loſt or deſtroyed, is not univerſal without exception.

Second point. I am not diſpoſed to controvert the definition which has been given of the nature of larceny. I admit that there muſt be a *felonious* taking of the property from the *poſſeſſion* of the proprietor, and on that admiſſion I am perfectly contented to argue the law of this caſe; for I am warranted by a ſeries of uncontroverted deciſions in ſaying, That the bill in queſtion was, to the moment of its converſion, not in the legal poſſeſſion of the priſoner, but of Mr. *Edwards*. I acknowledge that it is highly important to the juriſprudence of the country, that the legal diſtinction between *fraud* and *felony* ſhould be preſerved; but it would bring a contempt on the juſtice of the

the nation, to ſuffer its laws to be evaded by ſuch little contrivances as the priſoner made uſe of to obtain the bill. A man goes to *Smithfield* market and cheapens a horſe, which the owner delivers to him for the purpoſe of trying his paces. Upon this occaſion the common underſtanding of mankind would perhaps decide that the *actual poſſeſſion* of the owner was determined and gone by the delivery; but in the contemplation of law, if it ſhall afterwards appear that the poſſeſſion was obtained with intent to ſteal it, the delivery will not alter the *legal poſſeſſion*. The caſe of *Sharpleſs*, about nine years ago at this place, will confirm the doctrine for which I contend. *Sharpleſs* went to the ſhop of a hoſier, and ordered a quantity of goods to be ſent to his lodgings. The hoſier with proper caution ordered the ſervant not to leave the goods without the money. *Sharpleſs*, however, contrived to ſend back the ſervant and keep the goods, which he afterwards converted to his own uſe; and the judges determined that this was a felonious taking. The ſame principle is, if poſſible, more ſtrongly recognized in two caſes determined very recently. Firſt, *The King* v. *Patch*. A man drops a ring, and on pretence of dividing its produce with ſome by-ſtander, he picks it up, and then delivers it to the perſon he intends to defraud, taking as a ſecurity for his proportion of its value, a watch, or a cloak, or any other thing, which he may convert to his own uſe. Here there is ſomething given for the thing ſtolen, and this has frequently been determined to be felony; and yet after the watch or cloak are delivered, it is impoſſible to ſay that the actual poſſeſſion is not changed. The ſecond caſe is *The King* v. *Pares*, which a very ſhort time ſince received the ſolemn determination of all the judges in *England*. A man hires a horſe on pretence of taking a diſtant journey into *Eſſex*. In point of fact he never takes ſuch a journey, but ſells the horſe: this is determined to be felony. But I have troubled the Court with more caſes than it was neceſſary to have cited in ſupport of ſo clear a poſition; and I ſhall therefore only ſtate one more, in anſwer to the obſervations which have been made, to prove that the poſſeſſion was parted with when the note was delivered. A man goes to a public-houſe, and orders a pot of beer and change for a guinea to be ſent to the houſe of Mr. *Stiles*; and when it is brought, he ſends the ſervant back on ſome pretence, takes the change, and goes off. Had the publican who remained in the bar of his houſe any more controul over, or actual poſ-

ſeſſion of his money, than any man who hears me? And yet this Court has with great wiſdom held that this taking is felony. But it is aſked, At what preciſe period of time the felony in the preſent caſe can be ſaid to have commenced? I anſwer, preciſely at the ſame period of time at which it commenced in the caſes I have cited. In *Pares*'s caſe, it commenced the inſtant in which he puts his foot in the ſtirrup with an intent to ſteal the horſe: ſo here the felony commenced at the inſtant in which the priſoner got the note into his hands, with a felonious intent to convert it to his own uſe.

The Court left the caſe with the jury to conſider, firſt, Whether they thought the priſoner had a pre-concerted deſign to get the note into his poſſeſſion, with an intent to ſteal it? and ſecondly, Whether the proſecutor intended to part with the note to the priſoner, without having the money paid before he parted with it?

The jury found the affirmative of the firſt queſtion, and the negative of the ſecond; and concluded that the priſoner was therefore guilty.

The judgment, however, was reſpited, and the following queſtions referred to the conſideration of the twelve judges.

Firſt, Whether, as the bill in queſtion had not been produced, the parol teſtimony which had been given concerning it had been legally received.

Secondly, Whether the priſoner was guilty of felony, under all the circumſtances of this caſe?

The judges met at *Serjeant's-Inn Hall* to conſider of this caſe; and they were unanimouſly of opinion, that the parol teſtimony had been properly received; and as the jury had found a pre-concerted deſign in the priſoner to ſteal the note, he had been legally convicted of felony.

In the *July* ſeſſion following, he received ſentence to be tranſported for the term of ſeven years. *The King* v. *Aickles*, *Leach's Caſes*, *in Crown Law*, 239.

WITH reſpect to the purchaſe of annuities by money-lenders, inſtances of which have been ſtated; they have been attended with ſuch circumſtances of hardſhip and oppreſſion, that the legiſlature hath thought proper to guard the public againſt them by an act of parliament, called the Annuity

Annuity Act, 17 *Geo.* III. c. 26, 1777; the ſubſtance of which is as follows:

An Act for regiſtering the Grants of Life Annuities; and for the better protection of Infants againſt ſuch Grants.

The preamble recites, that "Whereas the pernicious practice of raiſing money by the ſale of life annuities hath of late years greatly increaſed, and is much promoted by the ſecreſy with which ſuch tranſactions are conducted." It therefore enacts that a memorial of all the inſtruments of writing, whereby any annuity or rent-charge ſhall be granted for life or lives, or for any term of years determinable on life or lives, ſhall within twenty days after execution be inrolled in the high Court of Chancery: and that every memorial ſhall contain the day of the month and year when the inſtrument bears date, the names of all the parties and for whom any of them are truſtees, and of all the witneſſes, and ſhall ſet forth the annual ſum to be paid, and the name of the perſon or perſons for whoſe life or lives the annuity is granted, and the conſideration for granting it, otherwiſe the inſtrument to be null and void to all intents and purpoſes.

II. And with reſpect to annuities already granted it enacts that all proceedings for recovering or ſecuring thereof ſhall be null and void, unleſs a memorial thereof be regiſtered in manner aforeſaid.

III. And further it enacts that the conſideration of all future annuities ſhall be in *money* only, and that the inſtrument granting or attempting to grant the ſame, ſhall fully and truly ſet forth in words at length the conſideration really and *bona fide*, and alſo the name of the perſon or perſons by whom and in whoſe behalf, ſuch conſideration, or any part thereof, ſhall be advanced, otherwiſe ſuch inſtrument to be null and void to all intents and purpoſes.

IV. And if any part of the conſideration ſhall be returned to the perſon advancing the ſame; or in caſe any part of the conſideration be paid in notes, if any of the notes, with the privity and conſent of the perſon advancing the ſame, ſhall not be paid when due, or ſhall be cancelled and deſtroyed without being firſt paid; or if the conſideration or any part of it, be paid in goods; or if any part of the conſideration is retained on pretence of anſwering the further payments of the annuity, or any other pretence; in all ſuch caſes the Court ſhall order the inſtrument ſecuring the annuity

annuity to be cancelled, on the application of the perſons by whom it is made payable.

V. The clerks fee for inrollment of the memorial, one ſhilling, if it does not exceed two hundred words, and ſixpence for every hundred words beyond that number, and the like fees for a certificate of ſuch memorial, which they ſhall grant when required: and one ſhilling for ſearching for the memorial.

VI. It further enacts that all contracts for the purchaſe of any annuity, from perſons under twenty-one years of age; or any attempt to confirm the ſame after they come of age ſhall be void. And if any perſon attempt by any means to procure a perſon under twenty-one to grant an annuity, he ſhall be guilty of a miſdemeanor, and may be puniſhed by fine, impriſonment, or corporal puniſhment.

VII. And further it enacts that if any broker, ſcrivener, or ſolicitor, ſhall aſk or receive directly or indirectly, above 10s. in the 100l. for procuring money for annuities or rents charge, he may be puniſhed by fine and impriſonment: and the perſon who paid ſuch broker, &c. ſuch procuration money, may be a competent witneſs.

VIII. Laſtly, however it is enacted, that this act ſhall not extend to the following caſes, viz. To annuities or rents-charge given by will or by marriage-ſettlement; or for the advancement of a child, or to thoſe ſecured upon lands of equal or greater value, whereof the grantor was ſeiſed in fee ſimple or fee tail in poſſeſſion at the time of the grant, or ſecured by the actual transfer of ſtock in any of the public funds, the dividends whereof are of equal or greater annual value than the annuity; nor to any voluntary annuity granted without regard to pecuniary conſideration; nor to any annuity granted by any body corporate; nor to any under 10l. unleſs there be more than one ſuch under 10l. from and to the ſame perſon.

PUBLIC

PUBLIC OFFICES.

Of buying and ſelling them.

OFFICES are a right to exerciſe an employment, and to take the fees and emoluments thereunto belonging; and which are either public, as thoſe of magiſtrates, or private, as of bailiffs, receivers, and the like. A man may have an eſtate in them, either to him and his heirs, or for life, or for a term of years, or during pleaſure only: ſave only that offices of public truſt cannot be granted for a term of years, eſpecially if they concern the adminiſtration of public juſtice, for then they might perhaps veſt in executors or adminiſtrators. Neither can any *judicial* office be granted in reverſion: becauſe though the grantee may be able to perform it at the time of the grant, yet before the office falls he may become unable and inſufficient: but miniſterial offices may be ſo granted: for theſe may be executed by deputy. *Black. Comm.* 36.

As to the giving or taking a reward for offices of a public nature, *Hawkins* obſerves, that nothing ſurely can be more palpably prejudicial to the good of the public, than to have places of the higheſt concernment, on the due execution whereof the happineſs of both king and people doth depend, diſpoſed of not to thoſe who are moſt able to execute them, but thoſe who are moſt able to pay for them; nor can any thing be a greater diſcouragement to induſtry and virtue, than to ſee thoſe places of truſt and honour, which ought to be the rewards of thoſe who by their induſtry and diligence have qualified themſelves for them, conferred on ſuch who have no other recommendation but that of being the higheſt bidders; neither can any thing be a greater temptation to officers to abuſe their power by bribery and extortion, and other acts of injuſtice, than the conſideration of the great expence they were at in gaining their places, and the neceſſity of ſometimes ſtraining a point to make their bargain anſwer their expectation. 1 *Hawkins's Pleas of the Crown*, ch. 67. ſec. 3.

For which reaſons among many others it was enacted by 12 *Rich.* II. c. 2. A. D. 1388. That all the great public officers of the realm, who have the power of appointing to public

public offices, ſhall be ſworn not to appoint for any gift or brokage, favour, or affection, but for their merit and deſert.

A law, ſays Sir *Edward Coke*, worthy to be written in letters of gold, but more worthy to be put in due execution. For certainly never ſhall juſtice be duly adminiſtered, but when the officers and miniſters of juſtice be of ſuch quality, and come to their places in ſuch manner, as by this law is required. *Coke on Litt.* 234.

By another ſtatute, viz. 5 & 6 *Edw.* VI. c. 16. A. D. 1552, entitled an act

Againſt buying and ſelling of Offices.

I. Reciting, That for the avoiding of the corruption which may hereafter happen to be in the officers and miniſters in thoſe courts, places, or rooms, wherein there is requiſite to be had the true adminiſtration of juſtice or ſervices of truth; and to the intent that perſons worthy and meet to be advanced to the place where juſtice is to be miniſtered, or any ſervice of truſt executed, ſhould hereafter be preferred to the ſame, and no other.

II. It is enacted, That if any perſon ſhall bargain or ſell, or take any reward, or promiſe of any reward, for any office, or the deputation of any office, any way concerning the king's revenue, or the keeping of his caſtles, or the adminiſtration or execution of juſtice, (unleſs it be ſuch an office as had been uſually granted before the making of the ſaid act, by the juſtices of the King's-bench, or Common Pleas, or by juſtices of the aſſize) that then every ſuch perſon, ſo bargaining or ſelling, or taking ſuch reward, or promiſe, &c. ſhall not only forfeit his right to ſuch office, or to the nomination thereof, but alſo every perſon who ſhall give any ſuch reward, or promiſe, &c. ſhall be adjudged a diſabled perſon in law, to have or enjoy ſuch office, &c.

III. And every ſecurity given for ſuch purpoſes ſhall be void.

IV. This act is not to extend to offices of inheritance, or to any office of partnerſhip.

V. Nor to offices in the gift of the chief juſtice, or juſtice of aſſize.

But the acts done by any officer removeable by force of this act, to be valid.

Articles were preferred againſt *Thomas* earl of *Macclesfield*, charging him with corruption and extortion, in taking of ſeveral

ſeveral of the Maſters in Chancery very great and exorbitant ſums of money, for their admiſſion into their reſpective offices, particularly of *Richard Godfrey*, Eſq. (who purchaſed the place of a Maſter of Sir *Thomas Gery*, for 5000l.) 840l. of *James Lightboun*, Eſq. (who was admitted Maſter on the death of *Samuel Browning*, Eſq.) 6000l. of *John Borret*, Eſq. (who purchaſed his place of *John Meller*, Eſq. for 9000l.) 1575l. of *Edward Conway*, Eſq. (who purchaſed his place of *John Orlebar*, Eſq. for 6000l.) 1500l. of *William Kynaſton*, Eſq. (who purchaſed of *William Rogers*, Eſq. for 6000l.) 1575l. of *Thomas Bennet*, Eſq. (who purchaſed his place of *John Hiccocks*, Eſq. for 7500l.) 1575l. of *Francis Elde*, Eſq. (who was admitted a Maſter on the death of *William Fellows*, Eſq.) 5250l. of *Mark Thurſton*, Eſq. (who was admitted a Maſter on the death of *John Borret*, Eſq) 5250l. Theſe facts were proved.

The earl in his defence, reſted much on the merit of his paſt ſervices; after which he endeavoured to juſtify the practice of ſelling offices, to the following purpoſe.

An office may be conſidered in two reſpects; firſt with reſpect to the duty, that is the concern of the public, that the perſon be duly qualified to diſcharge the office well: ſecondly, with reſpect to the profit and advantage; and that is merely private, and concerns the officer only; and whilſt he diſcharges his duty well, without extortion, or other miſbehaviour, the public is little concerned in it, whether the profit be more or leſs: as in thoſe offices, which are very numerous, and of great conſequence, that may be executed by deputy; provided the deputy behave himſelf well, the public has never concerned itſelf what his ſalary or allowance from his principal is, whether it be greater or leſs.

And as the perſon who is put into a very beneficial office, ſuch as one of theſe, for his life, has not any antecedent right to the office, and therefore not to the profits ariſing thereby, and he that prefers him is not bound to give it him; therefore when he puts him into it, he in effect grants him all the profits of the office for his life; and if the officer make him a preſent for it, either unexpected, by way of thanks, after he is put in; or expected, which he had told him of before; or give it at the time, or before that he is admitted; I ſee not any immorality either in the giver or taker: it is money given for profits to be received during life.

The public is concerned only in the goodneſs of the officer, not how advantageous to him the grant of the office is,

is, nor in the inducement which he that appointed him had to put him in; whether friendſhip, acquaintance, relation, importunity, great recommendation, or a preſent.

I agree, that a perſon taking a preſent, and putting in an unfit perſon, when he knew him to be ſo, or had juſt ground to believe him ſo, is criminal: not becauſe he had taken a preſent, but becauſe he had prejudiced the public knowingly: it may be an aggravation, that he had taken money; but the crime is, the wrong done to the public in the perſon advanced: it had been the ſame crime, had he done it for the ſake of kindred, or friendſhip, or for recommendation, or any other reaſon.

But if a perſon very well qualified be placed in an office, and the public has all the advantage from him that it can have from an officer in that poſt, and ſo I who have placed him have well diſcharged my duty to the public; is it material how well I loved him, how nearly he is related, who it was that perſuaded me to prefer him, or what he gave me on that account, whether before or after he was put in? will any of theſe circumſtances make me criminal in an action by which I ſerved the public well? If the public have all the benefit it can have, where is the immorality? Where is the crime, if I have an advantage too? eſpecially if uſage has in ſome ſort annexed that advantage to my office, which is taken from his?

Obj. I know it may be objected with great appearance of reaſon, that this practice is dangerous: it leads to inconveniences; it is a temptation to him that diſpoſes of places to make ill officers; and a temptation to the officers to extort money, and abuſe the ſubjects, in order to get up their money again.

Anſ. But is it therefore a crime, where the temptation is reſiſted, and a very good officer is put in, and he behaves himſelf perfectly well?

The point of the charge now under conſideration reſts ſingly on this: That I took money for admitting Mr. *Francis Elde* (for inſtance); and though taking money is a dangerous practice, and may be a temptation to let in an ill man, is it therefore a crime to put in *Francis Elde*, who is not alledged to be an ill man, or any way unfit; and is really an excellent maſter?

This argument concludes, only that the allowing it to be generally practiſed is inconvenient, and may, in the deliberations of the legiſlature, be properly uſed to prove it fit to be reſtrained by a law: but is not of force, in a court of juſtice,

juſtice, to prove it to be a crime in every inſtance, becauſe it may occaſion a crime in ſome. But farther, as to the matter of temptation to put one in unfit:

The liberty of preferring relations to offices, is a temptation to put in perſons unfit; and without doubt has often prevailed. Suppoſing therefore, it might be a proper matter of deliberation in the legiſlature, how far a reſtraint ſhould be put upon it; yet in the mean time, is advancing a relation to an office which he is fit for, a crime, becauſe in other inſtances it has occaſioned a crime, or may do ſo, or is a temptation to it? And would it be a ſufficient charge of a high crime againſt me, to ſay, that I illegally and corruptly put into ſuch an office *A. B.* my ſon, or my brother? I apprehend not.

Till a reſtraint is laid, the thing may be innocently done.

If a reſtraint be laid, the law will operate upon it, ſo far as that reſtraint extends; but farther than that, and the conſequences declared to enſue thereupon, it will remain as before.

Conſidering this, therefore, in itſelf, and upon the reaſon of the thing, where is the force of the argument? You took 5000l. for putting in Mr. *Elde*, or Mr. *Thurſton*, a very fit perſon, and an excellent Maſter; and therefore you are criminal, becauſe ſomebody elſe, at another time, may put in a Maſter not fit, upon his giving a preſent.

If this, then, be not criminal in itſelf, how do they prove it to be ſo by the common law?

The only caſe they have inſtanced as any authority for that purpoſe, is that of *Stockwith* and *North*, in *Moor*'s Reports. I have looked upon the caſe as it appears in that book, and it appears to be thus:

North was fined in the *Star-Chamber*, for that he, being ſheriff of *Nottingham* in the 43d year of Queen *Elizabeth*, took money for the goalerſhip and bailiwick for that year: he gave them firſt to his ſervants, who ſold them; but he himſelf received the money. And this was adjudged to be letting to farm of his country, contrary to the ſtatute 4 *Hen.* IV. cap. 5. Yet there note, that the ſtatute itſelf gives a penalty certain and pecuniary, and is *malum prohibitum, non in ſe.* But the Court took it, that inaſmuch as corruption follows upon the covetouſneſs of officers, and they are forced thereto by the prices which they give for things which ought not to be ſold; that this putting to farm, and ſelling of offices, is *malum in ſe*, and fineable.

It

It appears here, that this was a proſecution upon the ſtatute 4 *Hen.* IV. for the point adjudged was, that this was contrary to that ſtatute; and therefore, whether what was done, was againſt the common law, or *malum in ſe*, or not, was not at all in judgment before the Court.

So that this looſe expreſſion mentioned by *Moor*, (coupled too with a groſs miſtake) not at all to the point of judgment, is of very little force, to prove the caſe to which it is applied to be againſt the common law; and of leſs, to prove the preſent caſe to be ſo.

What then is there farther offered? Do they ſhew, that by the common cuſtom of *England*, which is properly the common law of *England*, the taking money for offices has been from time to time puniſhed or condemned as criminal?

No, it is admitted on the one hand, that there is not one inſtance of its having been puniſhed, or condemned as criminal, at the common law.

And, on the other hand, it is notorious, that in fact the greateſt offices have anciently been ſold, even by the kings: and that not in a clandeſtine manner, but ſo, that the price and what it was paid for, have been entered upon record.

The judgment of the houſe of lords was that the earl of *Macclesfield* ſhould be fined 30,000l. and be impriſoned in the tower until he paid it. *State Trials*, Vol. VI. p. 477.

To offer money to an officer of ſtate to procure the reverſion of an office in the gift of the crown, is a miſdemeanor at common law, and puniſhable by information, and even the attempt to induce him under the influence of a bribe, is criminal, though never carried into execution, as in the followiug caſe.

On *Friday* the 17th inſtant, Mr. *Dunning*, ſolicitor-general, moved for an information for a miſdemeanour, at the *private* proſecution of the duke of *Grafton*, (then firſt lord of the treaſury.)

He produced an affidavit of the duke of *Grafton*, proving a letter to be received by him from the defendant, containing an offer of paying 5000l. into the hands of Mr. *Henry Newcome*, to be delivered by him to the perſon who ſhould procure a patent of the reverſion of the office of clerk of the ſupreme Court of the iſland of *Jamaica*, for the lives of Mr. *Vaughan*'s three ſons, or the lives of three other perſons to be named by him.

He had likewiſe affidavits to authenticate the hand-writing of Mr. *Vaughan*.

Mr.

Mr. *Vaughan* ſent a *caſe* alſo to the duke, deſiring his peruſal of it at leiſure; which caſe related to the nature, &c. of this office.

It was accompanied by a letter to his Grace, incloſing an affidavit; which affidavit Mr. *Vaughan* ſays, "will ſhew the *propoſal*; which will be increaſed if *neceſſary*." The letter offers to "*leave ſecurity* in Mr. *Henry Newcome*'s hands, to anſwer paying the 5000l. to the order of the perſon who ſhould procure the ſaid patent." And it concludes: "I will take an opportunity of waiting upon your Grace: hoping the honour of a conference; otherwiſe, to *receive back* this affidavit, in order to deſtroy the ſame."

The affidavit incloſed in this letter was made before the lord mayor of *London*. It repreſented this to be a matter that required the utmoſt ſecrecy: and it is thereby ſworn, (beſides what is above mentioned) "that this whole affair is an entire ſecret to every one but Mr. *Henry Newcome*; and that, whether his preſent propoſal ſhall prove efficacious, or be rejected, he never will diſcloſe it to any perſon whatſoever."

The Court had aſked Mr. Solicitor-General upon his firſt moving this matter, "In *whoſe diſpoſition* this office was;" and wiſhed, that there might be an affidavit to that purpoſe.

Accordingly, an affidavit of one Mr. *Pollock* was produced and read: "That the office was in the diſpoſition of the *King*, and paſſed by a grant under the great ſeal, which took its riſe from a ſign-manual counter-ſigned by one of the ſecretaries of ſtate."

There was likewiſe another affidavit now read, of one Mr. *Reynell*: "That the ſupreme Court of *Jamaica* is like the three Courts of King's-bench, Common Pleas, and Exchequer, in *England*; beſides which, they have alſo a Court of Chancery."

Mr. *Wedderburn* and Mr. *Lee*, on behalf of the defendant, now ſhewed cauſe againſt granting an information.

The office of clerk of the ſupreme court of the iſland of *Jamaica*, was ſold under a decree of Chancery here, upon the holder of it in truſt, dying inſolvent.

Mr. *Lawton* bought it, and afterwards deviſed one moiety of it. The repreſentatives of Mr. *Paxton*, ſold the other moiety. The ſubdiviſions of it have been ſince both *deviſed* and *ſold*. The office was, conſequently, very carelefsly executed by deputies.

Mr. *Vaughan* took a leaſe of the office in 1765, and put it upon a proper footing. He went to *Jamaica* in 1765 and returned in 1766, and then applied to the Duke of *Grafton* and Mr. *Conway*, who were then the two principal Secreta-

ries of State, for a grant of the reverſion. He applied to the duke through Mr. *Newcome*. The duke's anſwer was, "That he did not meddle out of his own department." One Mr. *Howell* was attempting to procure it, and to get in the ſubſiſting intereſt; pretending to have the patronage of the Duke of *Grafton* in the point he was purſuing. This alarmed Mr. *Vaughan* on account of his *leaſe*, as well as of the reverſion. *Howell* and *Vaughan* had a treaty upon this ſubject: and *Howell* perſiſted in his attempt. Mr. *Vaughan* thought that *Howell*'s intereſt muſt ariſe from *money*; and therefore counteracted him by the ſame means: and, to remove all ideas of uſing this application as a *trap*, he made the affidavit of ſecrecy, and ſent it incloſed to Mr. *Newcome*. Mr. *Newcome* returned the affidavit: and then Mr. *Vaughan* ſent it to the duke.

The *old rent* of the office (the *nett* rent) was 400l. *per annum*: it has been now lately raiſed to 750 guineas for the *moiety* of it. The office had been *ſold*, *deviſed*, *leaſed*, and very badly executed *by deputy*.

Mr. *Vaughan* never mentioned the affair to any one. And yet two letters appeared in the public papers, calculated to affect Mr. *Vaughan*'s character; but fictitious in ſeveral articles. Theſe ſpurious letters repreſented him as a man that had abandoned his connexions and principles. They treated Mr. *Vaughan*'s conduct as extremely ſilly, and very unlikely to have its effect; and alſo as ſhewing the utmoſt ignorance of the world.

But as he took the office to be a *ſaleable* office, his only offence could be, that he ſuſpected the noble duke to be capable of liſtening to this his offer. And his affidavit only meant to clear him from intending to trap the duke into a tranſaction with a man obnoxious to him in politics; and then diſcover it.

They hoped the Court would not add the weight of their opinion, to the already prejudiced opinion of the public.

They then argued that this was *no offence at all*.

The ſolicitation to take money for an office in the *colonies*, is no offence. It would have been no offence, even if the act itſelf had been done; and the office had been granted purſuant to the ſolicitation.

It is not within 5, 6 *Ed.* VI. *c.* 16. That act does not extend to the *colonies*. The ſaving in §. 7, ſhews, that it was no offence at common law: that it was *not illegal:* for, this proviſo leaves it to the two chief juſtices of the *King's Bench* and *Common Pleas*, and juſtices of aſſize, to do as they might have done before, in any office to be given or granted by th.m.

them. This proves that the legiſlature did not conſider this ſale of offices to be *malum in ſe*.

The caſe of *Blankard* v. *Galdy* (in 2 *Salk.* 411 [a] and 4 *Mod.* 215.) alſo proves the ſame point; becauſe judgment was given for the plaintiff. That caſe was an action of debt upon bond, for the purchaſe of the office of provoſt marſhall in *Jamaica*, which concerned the adminiſtration of juſtice there. And it was then ſettled and determined, "That this act of 5, 6 *Ed.* VI. does not extend to *Jamaica*." And the plaintiff obtained a verdict.

In the caſe of *Godolphin* v. *Tudor*, it was determined that if the reſervation be out of the profits, the deputation is good. But if it be a ſum in groſs, then it is within the ſtatute.

The ſale of any office is not *malum in ſe*; notwithſtanding the inaccurate report of the caſe of *Stockwell* v. *North*, in *Noy* 102, and alſo in *Moer* 781. It is *no offence at common law*. It is no *crime*, no object of poſitive puniſhment. It is not *immoral*, if a good man and a ſufficient one is promoted to the office. Neither is it unlawful: for, in the caſe in *Salkeld*, judgment was given for the plaintiff. Nor is there any reſolution or even dictum, "that it is unlawful."

The offices at the Rolls and in the Exchequer concern the adminiſtration of juſtice, and are not within the proviſo in the act: and yet thoſe offices are ſold.

Therefore if the act had been *done*, and the propoſal carried into execution, it would not have been puniſhable at common law. Much leſs then, can the mere *ſolicitation* to do it be ſo, no act being done in conſequence of it.

There is one caſe of a ſolicitation to commit perjury, none being actually committed; in 2 *Shower* 1. *Rex* v. *Johnſon*, an attorney. But this is a ſingle caſe, and very imperfectly reported.

Mr. *Dunning*, Mr. *Wallace*, and Mr. *Ranby*, *contra*, for the proſecutor:

The charge is an attempt to corrupt the Duke of *Grafton* in the diſpoſal of an office of *truſt*, in the *colonies*, concerning the adminiſtration of juſtice; to influence a privy counſellor and the firſt lord of the Treaſury, to give his advice under a bribe.

As

[a] In this caſe it was determined, that where an uninhabited country is found out and planted by *Engliſh* ſubjects, all laws in force in *England* are immediately in force there; but in caſe of an inhabited country not till declared ſo by the conqueror: and the plaintiff recovered on a bond which was given for the office of provoſt marſhall in *Jamaica*.

As to this office being once *ſold under a decree*—It does not appear, what was then proved or underſtood about the nature of the office. But even if it is ſaleable, that will not warrant a man to ſolicit one of the firſt officers of the crown to take a *bribe for procuring* from the crown the diſpoſal of the reverſion of it.

This attempt is *criminal* in the tempter: and the Court will declare it to be ſo, by granting this information.

The judgment of the Court in the caſe of *Blankard* v. *Galdy*, might have been given, becauſe the matter was *not within* the act.

But neither that act nor the act of 12 *Ric.* II. *c.* 2. mentioned in Lord *Macclesfield*'s trial, are neceſſary to ſupport this motion.

It may be neither criminal or diſhonourable, to ſell offices which are *ſaleable*. But granting that point, yet the method which Mr. *Vaughan* has taken to come at this office, is criminal. 1 *Hawk.* P. C. c. 67. title, "bribery," p. 168, 169, is ſtrong to this purport.

In Lord *Macclesfield*'s caſe, the offence charged was taking money for appointing, and taking money for *recommending* to offices. That proſecution was not founded upon ſtatute, but upon common law. One of thoſe offices, clerk of the cuſtodies, was in the gift of the crown; and Lord *Macclesfield* inſiſted on a right to recommend: but yet he was not to *take money* for that recommendation.

So here Mr. *Vaughan* offered the Duke of *Grafton* 5000l. for ſuch recommendation: which money the duke ought not to take for it.

This offer is *criminal*; becauſe the taking the money was incompatible with the duty of the Duke of *Grafton*, as a privy counſellor and firſt lord of the Treaſury: it was offered, to tempt the duke to *betray his truſt* by giving his advice to the king under ſuch a *corrupt motive*.

To *ſolicit and counſel* the committing of a crime, is criminal.

As to the caſe of *Rex* v. *Johnſon* in 2 *Show.* p. 1.—It ſhews that the charge was conſidered *as an offence*; though the judges differed about the meaſure of the puniſhment.

As to what has been urged about this ſolicitation not being criminal, becauſe there was no act done in conſequence of it. The caſe of *Rex* v. *Plymton*, 2 *Lord Raymond*, 1378, is in point: for, that does not appear to be a promiſe *accepted*, or the money paid [a]. This very exception, "that the promiſe was no crime, without ſhewing the *fact done*," was taken and over-ruled.

In

[a] This was promiſe of money for a vote, which was held to be criminal.

In *Ruſh.* v. *Rawlins*, *Tr.* 29. 30 *G.* II. B. R.—No doubt was made whether it was not an offence at *common law*: the queſtion was, "whether it was *within the act*."

Here was an ill intention in the tempter; and ability in the duke to perform the thing propoſed, if he had liſtened to the propoſal.

Lord *Mansfield*. The defendant himſelf thought, this tranſaction would not bear the light. His affidavit ſays, "It was a matter that required the utmoſt ſecrecy." The extraordinary ſecurity for the money, which he propoſed to leave in Mr. *Newcome*'s hands; the affidavit offering to pay it, and ſwearing to keep it a profound ſecret; and the other circumſtances, all prove that he himſelf looked upon it as an unjuſtifiable tranſaction.

If theſe tranſactions are believed to be frequent, it is time to put a ſtop to them.

A miniſter truſted by the king to recommend fit perſons to offices would betray that truſt and diſappoint that confidence, if he ſhould ſecretly take a bribe for that recommendation.

A terrible conſequence would reſult to the public, if every thing that ſuch an officer is concerned in adviſing the diſpoſal of, ſhould be ſet up to *ſale*.

I am therefore for granting the information. He may demur, or move in arreſt of judgment, or appeal to a higher judicature, I am clear, that this is a miſdemeanor, and puniſhable as ſuch. But nevertheleſs I ſhall be open to hear arguments on a demurrer, or in arreſt of judgment, without prejudice.

As to the ſtatutes of 12 *R.* II. *c.* 2. and 5. 6 *Ed.* VI. *c.* 16. I agree with Mr. Solicitor General, "That the argument does not turn upon their "extending or not extending to *Jamaica*." For this office is granted under the great ſeal.

The argument is ſtrong, that theſe ſtatutes do not extend to *Jamaica*; though they were enacted long before that iſland belonged to the crown of *England*.

If *Jamaica* was conſidered as a *conqueſt*, they would retain their old laws, till the conqueror had thought fit to alter them.

If it is conſidered as a *colony*, which it ought to be, the old inhabitants having left the iſland, then theſe ſtatutes are poſitive regulations of police, not adapted to the circumſtances of a new colony; and therefore no part of that law of *England* which every colony, from neceſſity, is ſuppoſed to carry with them at their firſt plantation.

No act of parliament made after a colony is planted, is conſtrued to extend to it; without expreſs words ſhewing the intention of the legiſlature to be "that it ſhould."

But here, the office is granted by letters patent under the great ſeal of *England*; and therefore muſt be governed by the laws of *England*.

So that it turns upon the *common law*. And the firſt conſideration is, whether a great officer, at the head of the Treaſury and in the king's confidence, ſelling his intereſt with the king, in procuring an office, be not guilty of a crime.

The king is not to raiſe a revenue out of this office. The duke ſwears, and it is not denied, "That the 5000l. was offered to him, to *procure* this office for Mr. *Vaughan*."

Can it be doubted, whether the doing this would have been criminal in the Duke of *Grafton*? I ſuppoſe that moſt of the impeachments againſt miniſters have been for taking money to procure offices grantable by the crown.

Wherever it is a crime to *take*, it is a crime to *give*: they are reciprocal. And in many caſes, eſpecially in bribery at elections to parliament, the *attempt* is a crime: it is complete on *his* ſide who *offers* it.

If a party offers a bribe to a judge, meaning to corrupt him in a caſe depending before him; and the judge taketh it not: yet this is an offence puniſhable by law, in the party that offers it. 3 *Inſt.* 147. So alſo a promiſe of money to a corporator, to vote for a mayor of a corporation, as in *Rex* v. *Plymton*. And ſo alſo muſt be an offer to bribe a privy counſellor, to adviſe the king.

Therefore it appears to me that this is a miſdemeanor.

But if it be in the leaſt doubtful, I would have it put in ſuch a way, that a judgment may be ſolemnly had upon it.

Mr. Juſtice *Yates*. This has not the leaſt reſemblance to the *ſale* of an office. This charge is for attempting improperly the procuring of the office; not for giving a price for beſtowing it. It is an office in the gift of the crown; not of the duke himſelf.

The affidavit which mentions, "that the matter requires the utmoſt ſecrecy," ſhews the defendant's own ſentiments about it: and he deſires, in caſe of non-acceptance of his offer, to have the affidavit back again, *in order to deſtroy it*. This does not agree with the excuſe about a trap. No doubt, this is an *offence at common law*.

If it be but queſtionable, it ought to be inquired into: it is a matter fit for inquiry. It may hereafter be more ſolemn

lemnly determined, on demurer, or in arreſt of judgment, or otherwiſe.

Mr. Juſtice *Aſton* and *Willes* concurred. By the Court unanimouſly. The information granted. *The King* againſt *Samuel Vaughan*, *King's Bench*, 4 *Burrow's Reports*, *p.* 2494, 27 *November*, 1769.

Law the plaintiff, by the intereſt which he had in the commiſſioners of the exciſe, procured for his brother a ſuperviſor's place in that office, and in conſideration thereof his brother gave him a bond for the payment of 10l. *per annum* by half yearly payments, as long as he ſhould continue in the office. *Law*'s brother died, and having for ſome years omitted the payment of this annual ſum of 10l. *per annum*, whereupon *Law* ſued the bond againſt Mrs. *Law*, the widow and executrix of his brother, who now brought her bill in Chancery to be relieved againſt the bond.

In behalf of *Law* it was argued, that in point of law this bond is not void, as not being within the ſtatute, 6 *Edw.* VI. againſt the ſale of offices, that ſtatute having been made long before the exciſe became a branch of the revenue; that the law being in favour of *Law* it would be hard to take the benefit thereof from him, eſpecially when he was not plaintiff in equity, prayed no aid of this Court, and had been guilty of no fraud; that though the bond in queſtion had on a former occaſion been called a place brokage bond, and repreſented as equally miſchievous as a marriage brokage bond, yet it could with no juſtice or reaſon be reſembled to a marriage brokage bond, which had after great litigation and difference in opinion been condemned in equity, with a view to obviate a growing miſchief, occaſioned by ſervants or other mean perſons taking theſe bonds for procuring marriages into great families, which produced very unequal matches, to the unſpeakable uneaſineſs and diſcomfort of friends on account of ſuch alliances: whereas the preſent caſe could be attended with no ſuch inconveniencies; for if the officer who gave the bond, ſhould be thereby induced to act corruptly, or be guilty of extortion, he would be puniſhable in another manner, by indictment for ſuch corruption and extortion, and if found guilty, would forfeit his place: that it could be no objection that the whole ſalary or profits belonging to an officer ought to be received by him that executed it, for this was frequently otherwiſe, and yet tolerated in law and equity. Nay, in ſome of the greateſt offices of the Courts in *Weſtminſter-Hall*, the deputy who executed the office had commonly but a ſcanty allow-

ance, the greateſt part of the profits going to the principal, who underwent none of the trouble.

But by the lord chancellor; bonds and engagements of this kind are highly to be diſcouraged. Merit, induſtry, and fidelity, ought to recommend perſons to theſe places, and not intereſt with the commiſſioners, who, it is to be preſumed, had they known from what motive *Law* applied to them in behalf of his brother, would have rejected him. The officer's giving money to a friend of the commiſſioners for his intereſt, is altogether as bad as giving money, or a bond for money, to the commiſſioners themſelves, which undoubtedly would have been relieved againſt. It is a fraud on the public, and would open a door for the ſale of offices relating to the revenue. The taking away from the officer what the commiſſioners and Treaſury think to be but a reaſonable reward for his care and trouble, and an encouragement for his fidelity, muſt needs be of the moſt pernicious conſequences, and induce him to make it up by ſome unlawful means, ſuch as corruption and extortion. And though the exciſe was no part of the revenue at the time of making the ſtatute of 5 and 6 *Edw.* VI. yet there may be good ground to conſtrue it within the reaſon and miſchief of that law, which is rather a remedial than a penal one.

But ſuppoſing it to be a good bond at law, ſo are all marriage brokage bonds; (or contracts to procure matches) which yet are juſtly condemned in equity, as introductive of infinitive miſchief: and their having been much litigated and conteſted, fortifies the opinion that prevailed at laſt; for it ſhews what was the ſenſe of the ſupreme Court of judicature, after the inconveniencies of ſuch bonds had been fully weighed and experienced.

Wherefore ſince engagements of this kind are like to occaſion corruption and extortion in offices, by having the profits of places ſeparated from the places themſelves, let the bond be delivered up, and a perpetual injunction awarded thereon; and though this be a new caſe, let the defendant pay coſts. *Law* v. *Law*, 3 P. *Williams's Reports*, 391. 1735.

Although a public office be not within the ſtatute, 6 *Edw.* VI. yet any contract to procure the nomination to ſuch office is defective on the ground of public policy, and the money to be given is not recoverable.

The late Lord *Rochford* being groom of the ſtole to his majeſty, and in conſequence of that office recommended pages of the preſence, &c. agreed to recommend *Harrington* upon

upon a vacancy, on condition that he ſhould grant two annuities, one of 100l. to St. *Ferrol*, who had been Lord *Rochford*'s travelling tutor, and was then a bond creditor of his lordſhip for 600l. and the other of 40l. to another perſon. An action being brought upon the annuity bond, by St. *Ferrol* for the arrears of the annuity of 100l. *Harrington* applied to Chancery for relief. On the part of *Harrington* it was argued, that this bond was *pro turpi cauſa*; that Lord *Rochford* having a confidence placed in him by the king, had abuſed that confidence, by ſelling his recommendation; and, upon the public policy of the law, ſuch an agreement ought not to ſtand.

On the other hand it was argued, that this was not an office within the ſtat. of 5 and 6 *Edw.* VI. but merely an office reſpecting the king's private, not his public character.

The Lord *Chancellor* admitted that this office was not within the ſtatute of *Edw.* VI. yet as a matter of public policy, and publicly detrimental, he relieved *Harrington* from the payment of the annuity, and ordered a perpetual injunction. *Harrington* v. *Du Chatel.* 1 *Brown's Chancery Reports*, 124. 1781.

SEDUCTION.

Of Compenſation to Women in Caſe of Seduction.

UNDER this title (ante page 63), the caſe of *Walker* and *Perkins* is inſerted, in which it was determined that if a man enter into an obligation to pay money to a young woman on condition of her compliance with his deſires, this obligation is void, and ſhe will not be able to recover the money; but if after cohabition with him, he enter into an obligation to pay her money as a compenſation for what is paſt, and not as an inducement to future cohabitation, then ſuch obligation is good, and the money recoverable.

On this ſubject, the following caſes have alſo been determined.

Sir *Charles Cox*, a brewer in *Southwark*, having a wife that lived for ſome time ſeparate from him, made his addreſſes to a young woman in order to marry her, who at length,

length, againſt the approbation of her friends, conſented to marry him. Accordingly they were married, but the young woman had no manner of notice that Sir *Charles Cox* had any former wife then living.

Some time after the marriage it was diſcovered, that Sir *Charles* had another wife then living, which gave great trouble and uneaſineſs to this ſecond wife; but ſhe having diſobliged her friends by the marriage, and Sir *Charles* telling her, that his firſt wife was in years, very infirm, and not likely to live, and that in caſe he ſhould ſurvive ſuch firſt wife, he would marry her; this lady was prevailed upon to cohabit with Sir *Charles*; and about five or ſix years afterwards, he gave a bond to a truſtee of the ſecond wife, to leave her 1000l. at his death; and Sir *Charles* ſoon after dying, this lady brought her bill in Chancery for the 1000l. and there happening to be a deficiency of Sir *Charles*'s effects to pay the ſimple contract debts, the queſtion now was, whether this 1000l. thus ſecured by bond, ſhould take place of the ſimple contract debts.

It was inſiſted for the lady that ſhe was innocent, young, and greatly injured by Sir *Charles Cox*, who pretended to be a ſingle man, and having made his addreſſes as ſuch had drawn her in to marry him without the leaſt notice or ſuſpicion, that he was a married man; that all the compaſſion imaginable was due to a lady thus betrayed, who might have maintained an action at law for this injury, in which caſe, ſuppoſing the 1000l. in queſtion had been given by the jury for the damage, it had been but juſt, and if ſo, it was ſurely no leſs juſt in the huſband to give her a bond for the like ſum.

The Maſter of the Rolls took time to conſider of the caſe, and at length gave judgment, that this bond ſhould be poſtponed to all the ſimple contract debts owing by Sir *Charles Cox*. His honour admitted, that if the bond had been given upon the firſt diſcovery that Sir *Charles* was married to a former wife then living and by way of recompence for that injury, and therefore Sir *Charles* and this gentlewoman had parted, this had been a juſt bond, and for a meritorious conſideration; but that in the preſent caſe the bond was not given until five or ſix years after there had been a diſcovery of the former marriage, which made it reaſonable to think it was given by Sir *Charles* to this lady rather to induce her to continue to live with him, than upon any other motive; in which caſe the bond would be worſe than a voluntary one; for then it would be given for a wicked conſideration, that of her living

living in adultery with Sir *Charles*; and this unfortunate lady, whatever the conſequence had been, ought to have left Sir *Charles*, after ſhe had fully diſcovered he had a former wife living; that if ſuch a bond had been given to a lawful wife after marriage, this had been a voluntary bond, and void againſt creditors; much more, when given to one who was no wife, and upon ſuch illicit conſiderations. Lady *Cox's* Caſe, 3 *Peere Williams's Reports*, 339. A. D. 1734.

Catherine Turner had cohabited with *Thomas Vaughan*, after which, in conſideration of ſuch paſt cohabitation he binds himſelf in a bond to pay her an annuity of 30l. a year during her life: this annuity not being paid, *Catherine* puts the bond in ſuit againſt *Vaughan*, and in his behalf it was objected, 1. That it appeared by the condition of the bond that it was executed and given upon an illegal, flagitious conſideration of cohabitation, and that therefore the Court would not aſſiſt her to recover any debt thereupon.

Clive Juſtice. I am in a Court of common law, and not in an eccleſiaſtical Court; if a man has lived with a girl, and afterwards gives her a bond, it is good; ſuppoſe this bond had been given by *Thomas Vaughan* to *Catherine Turner* for being his miſtreſs, it would have been good in point of law, although in a Court of equity it would be poſtponed to creditors. Sir *Joſeph Jekyl*, Maſter of the Rolls, in a caſe where creditors interpoſed againſt a bond of this ſort, wiſhed he could have given the lady the money upon the bond; and where it is *præmium pudoris*, a Court of equity will not relieve againſt ſuch a bond, this condition is incapable of an explanation to make the bond an illegal act.

Bathurſt Juſtice. Where a man is bound in honour and conſcience, God forbid, that a Court of law ſhould ſay the contrary; and wherever it appears that the man is the ſeducer, the bond is good. *Bracton* ſays, When a man cohabits with an unmarried woman it is *legitima concubina*, and *Exodus*, chap. xxii. ver. 16. "If a man entice a maid that is not betrothed and lie with her, he ſhall ſurely endow her to be his wife." See alſo *Deuteronomy*, chap. xxii. ver. 28, 29. "If a man find a damſel that is a virgin which is not betrothed, and lay hold on her, and lie with her, and they be found, then the man that lay with her ſhall give unto the damſel's father fifty ſhekels of ſilver, and ſhe ſhall be his wife, becauſe he hath humbled her, he may not put her away all his days." Honour and conſcience ought to bind every man in point of law. In an action

action in the *King's-Bench* upon a promiſe of marriage, the evidence upon the trial was, that the defendant had bragged and boaſted that he had debauched the plaintiff, by promiſing her marriage; this cauſe being tried before me in the circuit, I left it to the jury upon that evidence only, and they gave a verdict for the plaintiff, and 500l. damages, which I thought right. The Court of *King's-Bench* approved of my opinion, refuſed to ſet aſide the verdict, and thought 500l. damages were little enough.

Gould Juſtice. The Court may take this for a lawful and conſcientious conſideration; we muſt preſume that *Thomas Vaughan* hath done what in honour and conſcience he ought to have done, and that he thought himſelf a wrong doer, and gave *Catherine Turner* this bond to make her amends. Judgment for the plaintiff. *Turner* v. *Vaughan*, 2 *Wilſon's Reports*, 339. 1767.

The Marquis of *Annandale* had unlawful familiarities with *Anne Harris* who was before a modeſt woman, but the marquis ſeduced her, and had a child by her, and afterwards gave her a bond for the payment of 2000l. within a year after his death; to be laid out in an annuity for the uſe and benefit of *Anne Harris* and the child, for their lives. The marquis died.

The marchioneſs, his widow, applied to the Court of Chancery, to be relieved againſt the bond as gained upon an unlawful and wicked conſideration; and *Anne Harris* alſo applied to the ſame Court to be paid the 2000l. out of the effects of the marquis, or laid out as intended in an annuity.

It was argued on behalf of *Anne Harris*, that the known diſtinction was, where the woman has before been a common ſtrumpet, and draws in a young man to give ſuch bond or covenant, in ſuch caſe equity will relieve; but where the man ſeduces a woman who was before a modeſt woman, and gives ſuch bond, there the ſeducer who has done the injury, ſtates and aſcertains himſelf the damages, which are to be the *præmium pudicitiæ*, the reward for chaſtity, and no relief to be had in equity.

On the other ſide it was objected, that ſuppoſing equity would not relieve againſt ſuch bond, yet it being a matter of turpitude, equity ought not to intermeddle, the conſequence of which would be, that both applications ſhould be diſmiſſed, and that this Court ſhould not lend any aſſiſtance in ſuch a caſe.

But

But to prove the contrary, the other ſide cited the caſe of *Ord* againſt *Blacket*, where Sir *William Blacket* having ſeduced Mrs. *Ord*, a young gentlewoman of good family and fortune, afterwards ſettled an annuity on her for years; but the eſtate on which it was ſecured was incumbered, and Mrs. *Ord* dying, her adminiſtrator brought a bill to diſincumber the land which was charged with this annuity, and was relieved accordingly.

They alſo cited the caſe of *Carew* againſt *Stafford* decreed about two years ſince, where a man granted an annuity to the woman out of the manor of *D.* when in fact he had no ſuch manor, upon which it was decreed that he ſhould ſettle this annuity on the woman out of other lands.

The Lord *Chancellor* ſaid, If a man does miſlead an innocent woman, it is both reaſon and juſtice he ſhould make her a reparation; but this caſe is ſtronger in reſpect of the innocent child, whom the father has occaſioned to be brought into the world in this ſhameful manner, and for whom in juſtice he ought to provide; and though the child be now dead, yet the caſe is to be taken as it was when the bond was given, and then the child was living. Decreed in favour of *Anne Harris.*

The marchioneſs afterwards carried this caſe into the Houſe of Lords, where the decree was affirmed. *Brown's P. C.* 445. Marchioneſs of *Annandale*, widow and adminiſtratrix of the Marquis againſt *Anne Harris. Chancery. 2 Peere Williams's Reports*, 432. 1727.

Where a young woman goes into a family and is then ſeduced by the huſband, and in conſequence of their intercourſe, a ſeparation takes place between the huſband and wife; no obligation from him to the young woman, as a compenſation, is valid.

The plaintiff, *Prieſt*, was a young woman, and came to live in the family of the defendant, *Parrot*, then a married man, as a companion to his ſiſter, ſhe is there ſeduced by him, which cauſed a ſeparation between him and his wife; *Parrot* obliges himſelf by writing to pay the girl 100l. and an annuity of 40l. and ſhe now brings her bill in this Court for the payment of it.

Lord *Chancellor*. This caſe is in ſome parts new; nor do I remember it has directly come before the Court. The conſideration of the grant is plain: for though expreſſed to be for divers cauſes and conſiderations, it is plain on the evidence, to what it is applied: nor is it diſputed. It is

is as plain alſo to me, that what this unhappy woman (who has been very criminal alſo) has ſubmitted to, was from the ſeduction of the defendant; for her youth, when ſhe came into the family, and good character before, are evidence thereof: and that certainly has been the principal ground of the determination of this Court, where it has been conſidered as *præmium pudicitiæ*, when the young woman ſubmitted to the ſuggeſtion of the man, and was guilty of no fault before. But I know no caſe, where the Court has given countenance to theſe ſort of bonds in caſe of a married man, ſhe knowing it. That differs the caſe; becauſe perſons, who ſubmit to a temptation of that ſort, are without excuſe; they know abſolutely, they are doing a wrong which cannot be recovered or healed, and which occaſions miſchief to families. That differs it from the caſes, wherein the Court has gone ſome lengths to make ſome proviſions for ſuch unfortunate people. Yet if this is a family of opulence, and this poor woman ruined by his temptation and corruption, it very much deſerves their conſideration, whether ſhe ſhould ſtarve: if therefore there is any probability of the family's doing any thing of that kind, as the act of the defendant was the occaſion of it, I would let the cauſe ſtand over.

I own, my preſent opinion is, I cannot give relief for thoſe reaſons, which diſtinguiſh the caſe extremely and materially from others which have been determined. Where a young woman, appearing to be modeſt before, is applied to by a man, and ſubmits to his temptation, he does a great injury; but ſhe knows the crime ſhe ſubmits to, is not ſo aggravating as adultery; and ſhe may be inclined to ſuppoſe, he will be induced to marry her; and there are often ſuch promiſes, which it is almoſt impoſſible to give evidence of: if the parties are both ſingle, there is room for preſumption thereof; and if that is the caſe, the ſubſequent marriage takes off the enormity of the offence before; and in moſt countries of *Europe* even legitimates the iſſue; which admits of preſumption, and is ſome excuſe: and beſides in ſuch caſe, people know they are doing that which is not of ſo bad conſequence in families. Whereas when a man takes and keeps a miſtreſs under the noſe of his wife, who thereupon leaves her huſband, that is ſuch a crime, as ſtares every body in the face: and that is this caſe. She knew it, and lived in the very family where ſhe ſaw all this. It then admits of no excuſe; and if a conſideration of that kind had been recited in the deed itſelf, or if in a bond, it would be void in law, nor would

would be countenanced in this Court. In other circumſtances the Court has made a diſtinction between the caſes, where it would not relieve, and where it would give aſſiſtance. In Lady *Annandale* againſt *Harris* the commerce was wholly after the death of the firſt wife, and before the ſecond marriage, and no proof to impeach the character. This Court ought not to warrant this, which would be of bad example in caſe of married perſons, and encourage people to enter into agreements of this kind. It is impoſſible but ſhe muſt know, what ſhe entered into was wrong, and for which there can be no excuſe. On the whole therefore the bill ought to be diſmiſſed, but without coſts. Had ſhe not known that he was married, as if the wife was at a diſtance, or if any impoſition was proved on her, it would be a different thing: but nothing of that appears in this caſe. She entered into the family knowing it, and continued ſo as to occaſion a ſeparation: and this Court ought to endeavour to preſerve virtue in families. *Prieſt* againſt *Parrot*. *Chancery*. 2 *Veſey's Reports*, 160. *Feb.* 8. 1750.

A man having debauched a young woman, and intending afterwards to put a trick on her, made a ſettlement on her of 30l. a year for life, out of an eſtate he had nothing to do with; yet he was decreed to make it good out of an eſtate he had of his own. Vide *Abr. Eq.* 87.

Of the Remedy of Parents in Caſe of Seduction.

IF a daughter be ſeduced, there is no remedy in point of law for the ſeduction, except on the ground of the daughter being conſidered in the light of a ſervant, and then, if in conſequence of ſuch ſeduction, the daughter is diſabled either by pregnancy, by leaving her father's houſe, or otherwiſe, from performing thoſe ſervices ſhe has been accuſtomed to perform, then the ſeducer may be proſecuted by her father for ſeducing his daughter, *by which he loſt her ſervice, per quod ſervitium amiſit.* It is not material what are the ſervices, or how ſlight they are; for even milking cows, or any other acts, will be a foundation for the action, and the jury never confine themſelves to the value of the ſervices loſt, but deliberate alſo on the whole circumſtances of the injury done, and give damages accordingly.

Alcott the defendant, who was a collector of land-taxes, viſited *Bennet*'s daughter in the character of a ſuitor; he went to demand payment of the land-tax, when *Bennet* being from home, his wife invited the defendant to go into

into her daughter's bed-chamber, where ſhe was lying upon the bed, and left them together for ſeveral hours: he during this time debauched her, and got her with child; for which her father, the plaintiff, brought this action of treſpaſs for entering his houſe, debauching his daughter, (deſcribing her as a menial ſervant) *per quod ſervitium amiſit*; by which he loſt her ſervice. It likewiſe appeared that the plaintiff was a conſiderable farmer, and that his daughter, who was thirty years of age, occaſionally did acts of ſervice. The jury gave a verdict for the plaintiff with 200l. damages; which the learned judge thought were not exceſſive.

A motion was made to ſet aſide this verdict: firſt, becauſe the damages were exceſſive; and ſecondly, that the action could not be maintained, the daughter being above the age of twenty-one, and no contract for ſervice having been proved.

Bearcroft, in behalf of the defendant, was to have ſhewn cauſe againſt the rule; but the Court deſired firſt to hear *Lane* in behalf of the defendant *Alcott*. Firſt, ſuppoſing the action can be maintained, the damages are exceſſive. It was in proof at the trial that the very injury of which the plaintiff complains was occaſioned by the act of the plaintiff's wife, by inviting the defendant into her daughter's bed-chamber, and leaving them together for a conſiderable time; and it has repeatedly been determined in actions for criminal converſations, that, if the act complained of be with the huſband's privity, the action will not lie. This doctrine was recognized in the caſes of *Worſley* verſus *Biſſet*, and *Foley* verſus Lord *Peterborough*. And though the act in the preſent caſe might not perhaps have been committed by the connivance of the plaintiff's wife, yet if it were reaſonably induced by her conduct, it will go in diminution of damages. But, ſecondly, this action will not lie. This is not an action on the caſe for the conſequential damages where the *per quod* is the giſt of the action, but treſpaſs for the immediate injury. Now if the treſpaſs for breaking and entering the plaintiff's houſe fall to the ground, that which is a conſequence muſt neceſſarily fall with it. It was proved that the defendant entered the plaintiff's houſe as a collector of the land-tax, therefore his entry was lawful, and his continuing there was at the requeſt of the plaintiff's wife; this would have ſupported a plea of licence, and evidence of it is good under the general iſſue. *T.* 21. *H.* 7. p. 28, pl. 5. At any rate there was no treſpaſs proved by the facts given in evidence at the trial. But even ſuppoſing a treſpaſs to have been proved,

ſtill,

ſtill, as the daughter was above twenty-one years of age, it was neceſſary to prove a ſpecial hiring and ſervice; for after the daughter came of age the father was not bound to maintain her. And though in *Poſtlethwaite* verſus *Parkes* it was contended that the action did not lie becauſe the daughter was in the ſervice of another, yet it does not follow in this caſe that, becauſe the plaintiff's daughter lived in his houſe, this action can be maintained, as no contract of hiring was proved. But this daughter was *ſui juris* at the time; therefore the injury, if any, is done to her. And there is no inſtance in which it has been determined that the father may recover in an action under circumſtances ſimilar to the preſent. For though in the caſe of *Tullidge* verſus *Wade* (3 *Wilſon* 18.) the daughter was thirty years of age, the objection was not taken.

Aſhhurſt, Judge. It is true indeed that the damages were conſiderable; and if we had been on the jury, we poſſibly might have been diſpoſed to have given a ſmaller ſum. But in an action for this ſpecies of injury, the Court will not try that fact; the judge who tried the cauſe having declared himſelf ſatisfied with the verdict.

Buller, Judge. An action merely for debauching a man's daughter, by which he loſes her ſervice, is an action on the caſe. But according to Lord *Holt*'s opinion[a], where the offence is accompanied with an illegal entry of the father's houſe, he has his election either to bring treſpaſs for the breaking and entering, and lay the debauching of his daughter and loſs of her ſervice as conſequential; or he may bring the action on the caſe merely for debauching his daughter, *per quod ſervitium amiſit*. In the preſent caſe the plaintiff has made his election, and has brought an action of treſpaſs for breaking and entering his houſe, and all the reſt is merely conſequential. And therefore it is true, as was ſaid, that if the treſpaſs had not been proved, the defendant would have been entitled to a verdict. But it is now perfectly clear that a licence to enter cannot be given in evidence under the general iſſue. The plea of "not guilty" only goes to deny the fact of the treſpaſs; now as that was proved in fact, the plaintiff was intitled to a verdict; and the only conſideration for the jury was as to the quantum of damages. And indeed, upon the whole, the

[a] Lord *Holt* ſpeaks as follows, A man cannot maintain an action againſt another for getting his daughter with child, but he may, for entering his houſe and getting her with child *per quod ſervitium amiſit*. 2 Lord *Raymond's Reports*, 1032.

the damages are not exceſſive; becauſe though the mother acted indiſcreetly, yet the defendant was certainly very culpable. He was introduced to the plaintiff's family in character of a ſuitor; he gained admiſſion into the houſe on honourable terms, and the family truſted to his honour; and therefore this is not like the caſe of *Worſley* verſus *Biſſet*. With reſpect to the objection that this action cannot be maintained by the father for debauching his daughter above age *per quod ſervitium amiſit*, no contract for ſervice having been proved; I take it to be perfectly well ſettled ſince the caſe of *Poſtlethwaite* verſus *Parkes*, that the action will not lie by the father, unleſs the daughter be proved in ſome way or other his ſervant. In that caſe the ground, which influenced the opinion of the Court, was, that the daughter was in the ſervice of another perſon. But in actions of this kind, the ſlighteſt evidence is ſufficient; even milking cows. Here inſtances of actual ſervice were proved, and therefore it is immaterial whether the ſervant be or be not hired for a year, or whether ſhe has any wages; it being ſufficient that ſhe is a ſervant *de facto*. If this had been an action on the caſe, this objection could not have prevailed; and much leſs can it be in this form of action.

Groſe, Judge. Declared himſelf to be of the ſame opinion. The motion therefore to ſet aſide the verdict was diſcharged. *Bennet* againſt *Alcott*, *King's-Bench*, 2 *Durnford and Eaſt's Reports*, 166. *Nov.* 23, 1787.

But if a man's daughter goes out to ſervice, and during ſuch ſervice is ſeduced and got with child, her father cannot maintain an action againſt the ſeducer.

This was an action of treſpaſs *vi et armis* for an aſſault upon the plaintiff's daughter, and getting her with child: and the declaration concluded with a *per quod ſervitium amiſit*.

It was tried before Mr. Juſtice *Bathurſt*; and a verdict was given for the plaintiff on the ſecond count, and forty ſhillings damages.

A ſpecial caſe was ſtated to this effect—The plaintiff's daughter being twenty-three years of age, hired herſelf to one *Saul*, her maſter, and ſerved him ſome time. During her ſervice, ſhe was gotten with child by the defendant; and becoming big with child, and unable thereby to perform her ſervice as ſhe was uſed and ought to do, ſhe was diſcharged by *Saul* her maſter, who paid her her wages in proportion to the ſervice ſhe had already done him; and the plaintiff

plaintiff her father received her, when no one elſe would, and lodged and boarded her in his houſe. She was there delivered of a male baſtard child, in *November* following; and the plaintiff, her father, maintained her in her lying-in, at his own expence.

The queſtion which aroſe at this trial, and which was reſerved for the opinion of this Court is, Whether the plaintiff can maintain the action?

Mr. *Davenport*, for the plaintiff, endeavoured to ſhew that he could.

The firſt queſtion is, Whether the father and daughter can be conſidered as maſter and ſervant?

Secondly, Whether her age makes any difference in the caſe; as ſhe was upwards of twenty-one; viz. twenty-three years of age?

Firſt. The action is maintainable by the father, upon the foot of being her maſter; as he has alledged *per quod ſervitium amiſit*. He agreed, that no action would lie, but by reaſon of the loſs of her ſervice. So are the caſes in 1 *Bulſtr.* 373. 2 *Lectu.* 1497. 1 *Ro. Rep.* 393, 394. *Cro. Eliz.* 769, 770. *Barham* verſus *Dennis*. Sir *T. Raym.* 259. *Hunt* verſus *Watton*, 31 *C.* 2. in *Succh. Style* 398. *Norton* and *Jaſon:* which is cited in *Raymond* 260, and was an action for breaking and entering the plaintiff *Jaſon*'s houſe, and aſſaulting his daughter, and getting her with child of a baſtard, *per quod ſervitium amiſit. Rolt. Ch. J.* thought that the father might have an action for the loſs of her ſervice caufed by this. So *Bro. Abr.* title treſpaſs, *pl.* 442, and *Ruſſel* verſus *Corne*, in 2 Lord *Raym.* 1032, and 6 *Mod.* 127. *S. C.* prove that it is neceſſary to ſay *per quod ſervitium amiſit*. But per *Holt*—"No action lies for aſſaulting and getting a daughter with child. But if he that has done it, enters his houſe, and aſſaults his daughter, and gets her with child, he may maintain an action for entering his houſe and aſſaulting his daughter and getting her with child, *per quod ſervitium amiſit*.

Saul, the maſter, here ſuſtained no damage: for he diſcharged her as ſoon as ſhe became unſerviceable to him; and paid her her wages only in proportion to her paſt ſervice.

The father may juſtify an action for a battery brought againſt him by one who was aſſaulting his child. 1 *Bacon's Abridgement*, 155. *Letter C.* A father has an intereſt in all his children: he had a writ *quare filium et heredem rapuit*. He muſt provide for them; and ought to receive comfort

from them: and if any take them from him, he ought to have a remedy for the injury. *V. Cro. Eliz.* 770.

Here, a daughter goes out to ſervice, within three miles of her father's houſe: ſhe is gotten with child, diſcharged, and returned upon her father, helpleſs and unable, in that condition, to maintain herſelf. He is obliged by 43 *Eliz.* c. 2. to maintain her, and did ſo from the neceſſity of the thing. Therefore, from the conſequential damage, an action is maintainable by her father, in whoſe houſe ſhe reſided; and where ſhe muſt, in this caſe, be conſidered as a ſervant.

Second point. Her being twenty-three years of age makes no difference. This young woman's maſter could not bring an action againſt this defendant: nobody but the father could ſue. And the damage is the ſame to him whether ſhe be over or under twenty-one.

He argued, That this caſe could not be conſidered upon the foot of emancipation; and concluded with praying judgment for the plaintiff.

Mr. *Wallace, contra*, for the defendant.

The foundation of actions of this kind has been the loſs of ſervice.

The father's intereſt in the child, whatever it might have been during infancy, ceaſes at the child's coming to the age of twenty-one.

Many injuries may be done to a child, which are not the ſubjects of action by the father.

Indeed an action will lie by a father, for taking away his ſon or his daughter. *F. N. B.* 3d edit. page 260. And the father has an intereſt in his heir. *Radcliffe's Caſe, Plowd.* 267. b.

But an action will not lie by the father for debauching his daughter. So was *Holt*'s opinion, in 2 Lord *Raym.* 1032. *Ruſſel* v. *Corne.*

If the father maintains the daughter in his own houſe, he is intitled to her ſervice and may maintain an action for the loſs of her ſervice. But here, ſhe was hired out to ſervice in another man's houſe.

As to the father's being obliged to maintain her. Such an objection can ariſe only from 43 *Eliz.* c. 2. But here it is not ſtated, either that ſhe was unable to maintain herſelf; or that the father was able to maintain her.

If ſhe had been under age, and under her father's roof, I would agree that he had been intitled to an action as for the loſs of ſervice.

Barham

Barham verſus *Dennis*, in *Cro. Eliz.* 769, 770, was not determined: but three judges, (*Anderſon*, *Walmſley*, and *Kingmil*,) held "that the father ſhall not have an action for the taking of any of his children which is not his heir."

Cro. Eliz. 55. *Gray* verſus *Jeferies*: "treſpaſs for beating the ſon, lieth not for the father."

The infancy was the ground of the action in *Raym.* 259. *Hunt* verſus *Wotton*: the ſon was an infant under the age of diſcretion.

They can produce no inſtance, no precedent of ſuch an action as this is: and their principle will not hold; becauſe it depends upon the loſs of ſervice, (which was not the preſent caſe).

N. B. It appeared that the parties were poor.

The Court propoſed a compromiſe; which was accepted: it was, "That all proceedings be ſtayed, without coſts on either ſide." Rule, by conſent, accordingly.

Lord *Mansfield*, addreſſing himſelf to Mr. *Wallace*, ſaid to him—"It is not upon any doubt, in point of law, that I propoſe this compromiſe:" meaning (I ſuppoſe) that he was clear with Mr. *Wallace*, "that this action could not be maintained." And on this ſuppoſition, I have ventured to report it, though it was not determined judicially and in form. However, there can be no doubt, but that the Court were all of opinion "that the action could not be maintained:" and therefore, in compaſſion to the plaintiff, whoſe daughter had been injured by the defendant, they wiſhed to ſave him from the payment of coſts. *Poſtlewaite* againſt *Parkes*, *King's-Bench*, 3 *Burrow's Reports*, 1878. *April* 1766.

James Mervin applied to the Court of *King's Bench* for an *habeas corpus* directed to *James Clarke*, Eſq; commanding him to produce *Lydia Henrietta Clarke*, his daughter, then detained in his cuſtody, together with the day and cauſe of her taking and detainer, and to undergo and receive what his majeſty's chief juſtice ſhould conſider of and concerning her. In order to obtain this *habeas corpus*, *James Mervin* made affidavit, alledging that the young lady was of full age, (viz. 22) and that ſhe had been *hardly uſed* and *confined* by her father.

James Clarke, Eſq; accordingly produced in the Court of *King's Bench* *Lydia Henrietta Clarke*, his daughter, at the ſame time ſtating, as a return to the *habeas corpus*, That ſhe, without any leave or notice to him or to his wife (her mother) ſecretly went away from his houſe in *Great Ormond-ſtreet*,

and took with her a box or bundle containing ſeveral ſorts of wearing-apparel and about 27l. in money.

That, in about 12 or 14 days time, he, being credibly informed " that his ſaid daughter had been inveigled *away* from him *by the inſtigation* of one *James Mervin*, a perſon of no *viſible occupation or ſubſtance*, nor keeping any houſe; *with* deſign to marry *her to one Joſeph Iſgrave*, who is under age, and who about two years ago *ſerved* the ſaid *James Clarke as a* footboy, and *is yet in no better condition*; and that they were all gone together into the Iſle of *Thanet*, where they were to get a licence for ſuch marriage;" he being under great concern for the welfare of his ſaid daughter, and in order to prevent the ſaid marriage, (ſhe being intitled to a conſiderable fortune, after her mother's death, and being likewiſe his only child) took a journey to find them out, and (if in his power) to prevent the ſaid intended marriage; and gave directions to his nephew Mr. *Peter Starkie Floyer*, to go in queſt of them, and if he found them, to endeavour to prevent the marriage, and to bring his ſaid daughter to him.

That his nephew found them out at a place called *Broad Stairs*, in the Iſle of *Thanet*: where the ſaid *James Mervin* repreſented himſelf as, and paſſed for the uncle of his ſaid daughter.

That the ſaid *Lydia Henrietta Clarke* came home with his ſaid nephew to his (the ſaid *James Clarke*'s) houſe, in *Great Ormond-ſtreet*; where ſhe arrived the 7th of *April* laſt: and the ſaid *James Mervin* came with her as far as *Canterbury*. But the ſaid *Joſeph Iſgrave* run away: and the ſaid *James Mervin* pretends he is gone to *Holland*.

That on her being thus brought home to him, he did, in the tendereſt manner, repreſent to her the ruin ſhe was inevitably falling into, if ſhe purſued a deſign to marry a perſon ſo much inferior to herſelf; and who, having no viſible way of livelihood, muſt reduce her to the utmoſt neceſſity and want, as well as diſgrace and ſhame. Whereupon ſhe aſſuring her ſaid father " that ſhe was not married," he, through his duty as a parent, and from the affection he bore towards her, did receive her into his houſe; and the mildeſt and beſt endeavours have been uſed, to diſſuade her from ſuch marriage; ſuch endeavours extending no further than what he humbly conceives to be conſiſtent with that parental care which may be uſed by a father towards his child: and no ſeverity whatſoever hath been uſed to her.

That ſhe hath, ever ſince the ſaid 7th day of *April* laſt (when ſhe came home to his houſe as aforeſaid) hitherto, of her own accord, continued to live and reſide with him (he father

father) and ſtill doth live and reſide with him, at his ſaid houſe, of her own accord and under no reſtraint whatſoever. And there is no other cauſe of detaining his daughter.

Lord *Mansfield* now only aſked her, "whether ſhe deſired to continue with her father, or to go elſewhere."

She anſwered—"to continue with her father."

Upon which, the Court told her, ſhe was at liberty to go. Which ſhe accordingly did.

Mervin's affidavit was now ordered to be filed, in order to proſecute him for perjury, and the Court recommended the proſecution very ſtrongly to Mr. *Clarke*. *The King* againſt *James Clarke*, Eſq; *King's Bench*. 1. *Burrow's Reports* 606, 26th *February*, 1785.

MARRIAGE.

Of procuring of Matches.

THE Courts of law and equity have on all occaſions guarded with particular care the rights of marriage. Among theſe rights is that of free choice, without any compulſion or ſiniſter means: on this principle all contracts and agreements to procure a marriage, which the law calls marriage brokage contracts, are void, as if A. contract with B. to give him 1000l. on his procuring ſuch a lady for his wife, the contract is void, and though B. accompliſhes the match, he will not be ſuffered to recover the money. If the match appear to be very unequal and improvident, B. will not only not be entitled to the money, but he may be puniſhed criminally for the act, *Lev.* 257. 5 *Mod.* 221. On the contrary, even if the match be between perſons of equal rank and fortune, and in every reſpect reciprocally advantageous, yet the party bringing it about cannot recover on any contract by which he was on ſuch an event to receive ſo much money. As in the following caſe:

Thomas Thynne, Eſq; having intentions to make his addreſſes to the Lady *Ogle*, gave a bond of 1000l. penalty to *George Potter* to pay 500l. in ten days after his marriage with the Lady *Ogle*; *Potter* and his wife aſſiſted in promoting this marriage, which afterwards took effect; ſoon after which

Thynne was barbarouſly murdered; and about ſix years after Mr. *Potter* brought an action upon this bond againſt Mr. *Thynne*'s executors, and proving the marriage, recovered a verdict. Thereupon *Hall*, his executor, preferred a bill in Chancery to be relieved againſt this bond, as given upon an unlawful conſideration: *Potter* acknowledged the promotion of that marriage to be the reaſon of giving the bond. Upon hearing the cauſe at the Rolls, the Court decreed the bond to be delivered up, and ſatisfaction to be acknowledged upon the judgment. Mr. *Potter* petitioned the Lord Keeper for a hearing; and the ſame being reheard accordingly, his lordſhip was pleaſed to reverſe that decree, and ordered *Thynne*'s executors to pay principal, intereſt, and coſts, or elſe the bill to ſtand diſmiſſed with coſts.

From this decree *Thynne*'s executors appealed to the Houſe of Lords, where it was argued on their behalf, that this bond ought in equity to be ſet aſide, for that even at the common law bonds founded upon unlawful conſiderations appearing in the condition were void; that in many inſtances bonds and contracts that are good at law, and cannot be avoided there, are cancelled in equity: that ſuch bonds to match makers and procurers of marriage are of dangerous conſequences, and tend to the betraying, and oftentimes to the ruin of perſons of quality and fortune: and if the uſe of ſuch ſecurities and contracts be allowed and countenanced, the ſame may prove the occaſion of many unhappy marriages, to the prejudice and diſcomfort of the beſt of families; that the conſideration of ſuch bonds and ſecurities have always been diſcountenanced, and relief in equity given againſt them, even ſo long ſince as the Lord *Coventry*'s time, and long before; and particularly in the caſe of *Arundel* and *Trevilian*; between whom, the fourth of *February*, 11 *Car.* I. was an order made in theſe, or the like words: "Upon the hearing and debating of the matter this preſent day, in the preſence of the counſel learned, on both ſides, for and touching the bond or bill of 100l. againſt which the plaintiff, by his bill prayeth relief. It appeared that the ſaid bill was originally entered into by the plaintiff unto the defendant for the payment of 100l. formerly promiſed unto the ſaid defendant by the plaintiff, for the effecting of marriage between the plaintiff and *Elizabeth* his now wife, which the ſaid defendant procured accordingly, as his counſel alledged. But this Court utterly diſliking the conſideration whereupon the ſaid bill was given, the ſame being of dangerous conſequence in precedent, upon reading three ſeveral precedents, wherein this Court hath relieved others in

in like caſes, againſt bonds of that nature, thought not fit to give any countenance unto ſpecialties entered into upon ſuch contracts: it is therefore ordered and decreed, that the ſaid defendant ſhall bring the ſaid bill into this Court, to be delivered up to the plaintiff to be cancelled." Then it was further urged, that the executors of *Thynne* had once a decree at the Rolls to be relieved againſt the bond in queſtion, upon conſideration of the ſaid precedent in the time of the ſaid Lord *Coventry* and others; and of the miſchiefs and inconveniences likely to ariſe by ſuch practices, which increaſe in the preſent age, more than in the times when relief was given againſt ſuch bonds: and therefore it was prayed that the decree might be reverſed.

On the other ſide it was urged, that the conſideration of this bond was lawful; that the aſſiſting and procuring of a marriage at the parties requeſt, was a good conſideration at law, in all times, to maintain a promiſe for payment of money: that this bond was voluntary, and the party who was obligor was of age and ſound memory; that here was no fraud or deceit in procuring it; that Chancery was not to relieve againſt voluntary acts; that here was a great fortune to be acquired to Mr. *Thynne* by the match; that here was aſſiſtance given: that the perſons were both of great quality and eſtate, and no impoſition or deceit on either ſide in the marriage: that it might be proper to relieve againſt ſuch ſecurities, where ill conſequences did enſue; yet here being none, and the thing lawful, and the bond good at law, the ſame ought to ſtand; that here are no children purchaſers or creditors to be defeated; that there are aſſets ſufficient to pay all; and conſequently there can be no injuſtice in allowing this bond to remain in force; that it was the expectation of the reſpondent, without which ſhe would not have given her ſervice in this matter; and that it was the full meaning of the appellant's teſtator to pay this money, in caſe the marriage took effect; that there was a vaſt difference between ſupporting and vacating a contract in Chancery; that though equity perhaps would not aſſiſt and help a ſecurity upon ſuch a conſideration, if it were defective at law; yet where it was good at law, and no cheat or impoſition upon the party, but he meant (as he had undertaken) to pay this money, and was not deceived in expectation, as to the ſucceſs of *Potter*'s endeavours, it would be hard in equity to damn ſuch a ſecurity, and therefore it was prayed that the decree ſhould be affirmed.

It was replied, that marriages ought to be procured and promoted by the mediation of friends and relations, and not

of

of hirelings; that the not vacating ſuch bonds, when queſtioned in a Court of equity, would be of evil example to executors, truſtees, guardians, ſervants, and other people having the care of children. And therefore it was prayed that the decree might be reverſed, and it was reverſed accordingly. *Hall* executor of *Thomas Thynne* againſt *Potter*. *Shower's Parliamentary Caſes*, 76.

"Where the huſband and wife both unite in ſecuring an annuity on a female ſervant, who had great influence in procuring the match, and although that annuity was confirmed ſome years ſubſequent to the marriage, yet it may be ſet aſide."

Gibſon was a confidential female ſervant to Miſs *Hallam* (who was about 20 years of age,) and had acquired very great influence over her miſtreſs, and was conſulted upon, and dictated to her miſtreſs in all caſes of courtſhip and marriage.

A treaty of marriage took place between *Philip Bennet* and Miſs *Hallam*, but before the marriage *Bennet* entered into a bond to pay *Gibſon* 1000l. (but this bond was afterwards given up, when or on what account does not appear) and beſides this there was a clauſe inſerted in the marriage articles to ſecure *Gibſon* an annuity of 100l. a year, and it was provided that every part of theſe articles might be revoked by Miſs *Hallam* after her marriage, except only the clauſe, giving this annuity to her ſervant *Gibſon*, the huſband and wife, *Gibſon* and a Mr. *Allen* were parties to the articles.

The marriage took place in 1733, and in 1736 a new grant was made to *Gibſon* confirming this annuity of 100l. the wife died, and the annuity was regularly paid for ſome time, but application is now made to the Court of Chancery to ſet it aſide.

In behalf of *Bennet* it was argued as follows: whether he is intitled to relief againſt this annuity depends on two queſtions: whether it is not in all the forms of it a marriage brokage contract, as being the price of the ſale of the lady? And if ſo, whether any acquieſcence, payment, or acts by *Bennet* alone, or by *Bennet* and his wife, will prevent the going into conſideration of the ground of the argument, and the giving relief? It will appear that *Gibſon* was hired at wages, and was a nurſery maid in the lady's family, and got ſo abſolute a power and controul over her from her mother's death, and ſo entirely into her confidence, that ſhe could put a negative upon any match, and had the government

ment and diſpoſal of her. The bond made part of the tranſaction, and was a bribe on the marriage: the only other conſideration ſet up is gratitude and generoſity in her miſtreſs.

Then why did not *Gibſon* ſtay till after the marriage? Her anſwer admits giving the bond; but does not remember the conſideration. The principle on which the Court goes is, that the man giving thoſe bonds cannot refuſe, if he will ſucceed in what he goes about. If the ſum to be paid on the marriage is to third perſons having no influence over the party, yet it is conſidered as bribing them; but ſtronger in caſe of a parent, guardian, or ſervant having gained a confidence; becauſe the marriage depends on it, and it was had in conſequence of this. One inſtance among others of her influence is, her directing the ſervant to bring her the letters of her miſtreſs's ſuitors, and telling her ſhe ſhould not have ſuch and ſuch perſons. Where the relief prayed ariſes from perſonal grounds of equity from impoſition, or the drawing into what was not underſtood or explained, ſubſequent acts of ratification ſhewing that *Bennet* was fully informed, will rebut and take away the foundation. But where the relief is upon the agreements being corrupt, and ſuch as could not be entered into, though *particeps fraudis*, the Court will relieve; for ſuch agreement ſhall not ſtand, and there is no inſtance where acquieſcence can ſanctify an iniquitous tranſaction. As where uſurious intereſt is paid for thirty years, in *Boſanquet* v. *Daſhwood*; which being reheard, your *Lordſhip* agreed with Lord *Talbot* there every payment was a ratification: yet the Court thinking it a wrong act, ſo that no one could debar himſelf from taking advantage of it, decreed, that the account ſhould go back: gaming debts are relieved, however often ratified. If father and ſon clandeſtinely agree in fraud of the public marriage-agreement, and the ſon makes a new deed of it every day, he could not be barred relief, though a party; for no other could have it, the Court relieving for the public in general. This agreement was a groſs injury to the lady, bribing the perſon, by whoſe advice ſhe was governed, into the match; which otherwiſe ſhe might not think proper, if her reaſon and judgment were exerciſed. If ſuch a ſecurity was taken on pretence of taking an account, it would be equally bad, being only a colour: but there is no evidence of any thing due to *Gibſon*, much leſs a ſum anſwerable to this annuity and the 1000l. which, though given up, makes part of the tranſaction. In Duke *Hamilton*'s caſe, there was no perſonal impoſition, it being got before marriage, and in favour of the

the lady's mother, whoſe influence was preſumed; and whatever was preſumed there, will be proved here in reſpect of a common ſervant.

For *Gibſon* it was argued, that a marriage-brokage contract is only, where money is given to procure a marriage; which on its original merits the Court will never ſuffer: this is not ſo. If a lady of large fortune has contracted a friendſhip during infancy on the foundation of ſervices, and tells a man ſhe will not marry, unleſs proviſion is made for ſuch a perſon; in purſuance of which the huſband and wife join to do that, which the wife ſaid ſhe would do; this is no contract for procuring the marriage. She often declared, that whenever ſhe did marry, ſhe would provide for the maintenance of *Gibſon* on account of her friendſhip for her. It is not a clandeſtine private tranſaction, without knowledge of the perſon to be procured. Huſband and wife both join; ſo that no injury can be to a perſon conuſant, a contracting party, privy to the whole. There is no evidence of a treaty with *Gibſon* that the money ſhould be advanced, or that there ſhould be the marriage; nor that it was carried on with her privity or application to influence her miſtreſs. The queſtion here is different from that in other caſes, particularly *Hall* v. *Potter*, where the fact was admitted, but the conſequence denied: here *Gibſon* allows the principle, if this is a marriage-brokage bond, but diſputes the fact; which is the ſingle queſtion, and depends on the evidence of both ſides. Here is ſufficient to ſhew whence the grant took its riſe, and that it was fair and juſtifiable. It ſhould be proved, that this influence was acquired unduly; or ſo uſed, when acquired: whereas there is no evidence of any communication between *Cole* and *Gibſon* to do any ſuch office, as the equity of this bill is founded on. In all inſtances of marriage-brokage it is a proviſion by the party purchaſing or giving the bribe; and never ſo deemed, where done above board, and with privity of the perſon; who, if ſhe had been ſold, would not have been made party to the contract, being of an age to be ſenſible of ſuch perfidy, which would rather have enraged her againſt the perſon procuring it. Beſides *Cole* has releaſed to *Gibſon*.

Lord *Chancellor*. To be ſure this Court has been extremely jealous of any contract of this kind made with a guardian or ſervant, eſpecially with ſervants in reſpect of the marriage of perſons over whom they have an influence; (and has been juſtly ſo; nothing tending more to introduce improper matches) and by rules eſtabliſhed, not regarding whether the match is proper or no, if brought about by a

marriage-brokage contract, ſets it aſide; not for the ſake of the particular inſtance or the perſon, but of the public, and that marriages may be on a proper foundation: therefore though a proper match, as it was in *Hall* and *Potter*, yet for the ſake of the miſchief that would be introduced, and to prevent that influence which ſervants more eſpecially would gain over young ladies, the Court ſets it aſide: and if that was the nature of the contract, I do not know that ſubſequent coufirmations have been permitted to ſtand in the way of the relief ſought. I will not ſay, there may not be ſuch a confirmation or releaſe given, as may releaſe the remedy of the party; for it is hard to ſay that in a Court of equity, a man having a right to action or ſuit to be relieved in equity, and knowing the whole of the caſe, may not releaſe that, on whatever conſideration it ariſes, ſo far as regards himſelf: but it muſt be applied to that particular caſe, doing it with his eyes open, and knowing the circumſtances. Nothing is ſufficiently ſhewn in this caſe to releaſe and diſcharge that relief *Cole* might have on the ground of the marriage-brokage contract: there is no recital or collateral evidence that it was applied, or intended to be applied, to any right to action or ſuit *Cole* might have to be relieved againſt this contract: and it now appears by *Gibſon*'s own ſhewing, on a plea put in to a bill, calling her to account for the money received, that ſhe pleaded the releaſe only to that particular relief ſought by the bill, that prayed an account, not as to the relief againſt this contract and grant of this annuity; and is therefore to be reſtrained, as *Gibſon* herſelf has reſtrained it; it being common in equity to reſtrain a general releaſe, to what was under conſideration at the time of giving it: ſo that this releaſe muſt be laid out of the caſe. Nor will the annuity's being granted after the marriage alter the caſe; for in that great authority in Lord *Coventry*'s time of *Arundel* v. *Trevilian*, the bond for performance was given after marriage; the huſband having his hands free: yet the Court even ſo long ago did not ſuffer it to prevail. In theſe caſes therefore ſuch a ſort of confirmation or ſubſequent acts have not been conſidered: nor in other caſes where there is remedy on like grounds; as in private, clandeſtine agreements in contradiction of the public marriage agreement; as by huſband to return part of his wife's fortune without the privity of his own relations; for unleſs ſomething releaſed or barred his action, the Court will never ſuffer ſuch ſubſequent acts to bar it. But notwithſtanding all this be true, and the rule of the Court is ſo, yet undoubtedly

doubtedly a huſband or wife, or both together, may with the privity of each other at the time of the marriage, agree to give a ſum of money or an annuity by way of reward to an old ſervant for ſervices performed; which when done with their eyes open by both, free from any imputation or contract in reſpect of the marriage to be had, but barely from the motive of gratitude or generoſity, the Court will not interpoſe to ſet it aſide. The caſes of marriage-brokage bonds have been generally, where granted by one of the contracting parties without privity of the other; but if both agree to give on the marriage, no impoſition can be preſumed on one more than the other: though that is a pretty odd tranſaction to agree by the articles on the marriage to do ſo. But where the Court does not interpoſe on the motive of gratitude for ſervices performed before and long attendance, the Court is to look very narrowly into it to ſee that *that* is the real conſideration; for as it is a pretence eaſy to be made, and has been often, the Court is to ſee that it is clear of marriage-brokage, and that one conſideration does not ſtand in place of the other. Laying all the evidence out of the caſe relating to the marriage-brokage, I do not like the tranſaction on the grant of the annuity itſelf; which is the very firſt clauſe in the articles, and the only part thereof not ſubject to power or revocation; which is a very ſtrange tranſaction; for though the power is in the wife herſelf, ſhe is in a very different ſituation after marriage, as her huſband may prevail over her by good or ill uſage; ſo that there is not a more uncertain or precarious way of ſettling an eſtate than by leaving the wife's ſeparate eſtate in her own power after marriage; which was the conſequence of Mr. *Smith*'s of *Eſſex*, ſettling to the ſeparate uſe of his two daughters. Mr. *Allen*, the other party to the articles, has not executed them: nor is there evidence that he knew any thing of the matter. This annuity is provided by this deed for a ſervant, who, it is ſtrongly proved, had gained a very great influence over her miſtreſs. Why did ſhe not direct the letters to be brought to the guardian, who was then in the ſame houſe? She ought to have done it. If this had been done by a guardian on marriage of his ward under age, though he had not made himſelf party to the articles, but they were prepared with his privity, and one of the proviſions therein was for 100l. annuity to take place in that marriage, I would without any difficulty have ſet it aſide: and it appears, this ſervant had gained as much authority as

as a guardian. Abſtracted therefore from the marriage-brokage it is not to be countenanced, unleſs ſupported by better proof of the intent of both parties to make ſome proviſion for her. But how is this connected with any agreement, that can be called a marriage-brokage agreement? That depends on the evidence; which is not clear, but liable to an uncertainty; yet it is under very great ſuſpicion, as it now ſtands before me. It appears, that it was the brother of *Gibſon* who introduced Mr. *Bennet* to this lady: it was opened, that the bond was on conſideration to pay 1000l. on the marriage; but is not proved: and it muſt be taken, that the cancelled bond is in *Cole*'s cuſtody. But how does it ſtand on *Gibſon*'s anſwer? Her not remembering the conſideration induces a ſuſpicion; for it is impoſſible that *Gibſon*, who had nothing, could have forgot the conſideration of giving her 1000l. If the bond was given, as *Cole* ſays, to pay 1000l. on the marriage, and when the annuity was made ſecure, the bond was given up; it would be very ſtrong evidence of this being a marriage-brokage bond; as being given for the marriage, and afterward the annuity is granted on the bond's being given up; which will tack them both together. But if the tranſaction ſhould appear to ſtand clear of corrupt management in reſpect of the marriage, and that the grant of the annuity proceeded from the generoſity of the miſtreſs, and with common conſent, and that the bond was given to ſecure the annuity, becauſe the miſtreſs was under age, that may be another conſideration. There is ſtrong proof of the general influence, which may be gained by proper ſervices, and made proper or improper uſe of. *Gibſon* conceals the conſideration of the bond; and ſo does *Cole;* it is proper therefore to be inquired into, to ſee what was the conſideration of the bond; which muſt be tried.

I will therefore direct three iſſues: 1. Whether the bond was executed in conſideration of, or as a reward for *Gibſon*'s procuring or aſſiſting *Cole* in his marriage, or on any other, and what conſideration. 2. Whether the 1000l. was thereby made payable at or on the marriage, or any other and what time. 3. Whether the annuity was granted in conſideration of the bond, or procuring or aſſiſting *Cole* in his marriage, or for any other and what conſideration. But if the jury ſhould find any other conſideration for the bond or annuity, or any time for payment, let it be indorſed. *Cole* v. *Gibſon*, 1 *Veſey's Reports*, 503. 1750.

And

And ſo obnoxious in the eye of equity are theſe engagements, that even where a third perſon is materially injured by depending upon a ſecurity founded on the conſideration of procuring a match, ſuch ſecurity will notwithſtanding be ſet aſide; as where

A note for payment of ſo much money was given to a maid-ſervant, in conſideration of the endeavours ſhe was to uſe for the procuring ſuch a match. The maid ſervant marries one that knew nothing of the conſideration of the note, but was induced to marry her upon account of the money he thought her intitled to by the note: ſo that he might be looked upon as a purchaſer for a valuable conſideration, without notice of the reaſon for which this note was given, and yet the note was ſet aſide. *Goldſmith* v. *Bunning*, cited in *Turton* and *Benſon*, 10 *Modern Reports*, 448.

In the caſe of *Smith* v. *Bruning*, 2 *Vernon's Reports*, 392, A. D. 1692. The Court of equity in a caſe of this kind went ſtill further, for it not only decreed a bond for the procurement of a match to be delivered up, but alſo decreed a gratuity of fifty guineas actually paid to be refunded.

And ſo jealous is the law with reſpect to this freedom of choice, that if a perſon enters into an obligation to marry a particular perſon, equity will give relief, as where

Key filed her bill to be relieved from the payment of a bond drawn in common form, for payment of a ſum of money; but it was proved to be made on an agreement that *Key* ſhould either marry her ſervant, or ſhould, by way of forfeiture, pay *Bradſhaw* the ſum of money mentioned in the condition of the bond.

The Court decreed this bond on debate to be delivered up to be cancelled, it being contrary to the nature and deſign of marriage, which ought to proceed from a free choice, and not from any compulſion. *Key* v. *Bradſhaw*, 2 *Vernon's Reports*, 102. 1689.

Of Purchaſing the Conſent of Parents or Guardians to Marriage.

AS the Courts of equity have thus taken care to prevent the evil conſequence of bargains to procure marriages by reſcinding them, ſo they are equally careful to ſave a party from

from thoſe contracts which he might be tempted to enter into with thoſe who have the power of giving or withholding their conſent to marriage. All contracts therefore for the purpoſe of obtaining the conſent of parents or guardians will be reſcinded on application to the Court of Chancery.

Fowler the father told the ſon, he would not give his conſent to his marriage with *Sloan*'s daughter, except he would enter into a bond to pay him ſuch a ſum of money, as he ſaid, he wanted for a proviſion for his younger children; upon which the ſon, rather than the match ſhould go off, gave his bond for the ſum required: but after the marriage he was relieved by Chancery from the payment of it. *Sloan* v. *Fowler*. 10 *Mod. Rep.* 348.

This ſubject is connected with the next head, under which more will be ſaid of it.

Of Fraud and Impoſition reſpecting Marriage Portions and Fortunes.

UNDER this head we will firſt notice the caſe of a woman attempting to deceive an intended huſband.

Where a woman previous to her marriage, ſettles her eſtate in ſuch a manner as to deprive her intended huſband of all power over it, and without his knowledge, it is ſuch a contract as a Court of equity will reſcind, as being in derogation of the rights of marriage.

Lady *Dayrille* before her marriage, without Mr. *Carleton*'s (her intended huſband) privity, had conveyed her eſtate, of good value, to the Earl of *Dorſet*, *Millington* and others, and their heirs in truſt, that they ſhould permit ſuch perſon and perſons, to receive the rents and profits, and diſpoſe thereof, as ſhe, whether covert or ſole, ſhould appoint. *Carleton* the huſband, on diſcovering this after the marriage, filed his bill in Chancery to avoid that conveyance, being in derogation of the rights of marriage, and without the huſband's privity; and the lady being crazed in her underſtanding, endeavoured to run away from her huſband, and ſtirred up her creditors to ſue him.

For the huſband it was inſiſted, that the deed being made without his privity, was in derogation of the rights of marriage, and therefore ought to be ſet aſide, and cited the

the caſe of Sir *William Howard* for that purpoſe, and the caſe of *Edmonds* againſt *Dennington* about four years ſince: where a woman on agreement before marriage with her huſband, being to have power to act as a feme ſole, notwithſtanding that marriage, and the huſband dying, and marrying again, the ſecond huſband not being privy to the ſettlement on the firſt marriage; it was decreed, that the ſecond huſband ſhould not be bound by that ſettlement on the former marriage.

The Lord *Chancellor* in this caſe decreed that the plaintiff *Carleton* ſhould have the poſſeſſion of the eſtate againſt the Earl *Dorſet* and *Millington*, &c. and that they ſhould make a conveyance of the lands to the ſix clerks, that it might be ſubject to the order of the Court. *Carleton* Eſq. v. Earl of *Dorſet* and others. 2 *Vernon's Reports*, 17. 1686.

But a widow before her ſecond marriage may make ſuch previous ſettlement, in behalf of her children, by a former huſband, without the intended huſband's privity.

Thus a widow before ſhe married *Matthews*, her ſecond huſband, aſſigned over the greateſt part of her eſtate, to the value of 800l. to truſtees, as a proviſion for her children, by her firſt huſband. *Matthews* after his marriage, having got this deed into his poſſeſſion, ſuppreſſed it.

The truſtees for the children applied to Chancery, and upon hearing that it was inſiſted for *Matthews*, that this deed made by the widow, a little before her marriage with *Matthews*, was fraudulent, and done with a deſign to cheat her huſband, and ought not therefore to be countenanced in equity; and cited the caſe of Sir *Philip Howard* and *Baker*, where an aſſignment made by the widow before her marrying a ſecond huſband was by decree ſet aſide.

But the Court thought, that a widow might, with a good conſcience, before ſhe put herſelf under the power of a ſecond huſband, provide for the children ſhe had by the firſt; and the deed being ſuppreſſed by *Matthews*, by which the particulars and value of the eſtate might appear, decreed him to pay the 800l. without directing any account. *Hunt* v. *Matthews*, 1 *Vernon's Reports*, 408. 1686.

Where a woman previous to her marriage, in order to deceive her intended huſband, with reſpect to her fortune, borrows money and gives her bond for it: the huſband will not be liable to the payment of this bond, as he is by law to the payment of all her debts, previous to marriage, becauſe

becauſe it is a fraud on marriage, neither would ſhe herſelf be liable to the payment of this bond in caſe ſhe ſurvives her huſband, as ſhe would be to ſuch of her debts as are not recovered from the huſband during his life; becauſe that which was once a fraud will always be ſo.

When a marriage was treating between one *Gringer* and the ſiſter of *William Pitman*, the woman not having ſo great a portion as the man inſiſted upon, ſhe prevails with her brother *Pitman* to let her have 160l. to make up her portion, and gave him bond for repayment of it; and thereupon the marriage was completed: and the huſband, who knew nothing of the bond, died without iſſue, and the wife ſurvived him, and afterwards died, having made her will, and *Gale* executor. *William Pitman* the brother dies, and makes the defendant *Lindo* his executor, who put the bond in ſuit againſt *Gale*, as executor of the widow, to recover back the 160l. and thereupon he brings in his bill to be relieved.

For *Lindo* it was inſiſted, that although this might be a fraud, as againſt the huſband or any iſſue of his, who were to have the benefit of the marriage agreement; yet the huſband being dead, and there being no iſſue, this bond is good againſt the woman herſelf, and by conſequence againſt her executor, there being no creditors in the caſe, nor any deficiency of effects.

Lord Chancellor. You admit the huſband might have been relieved on a bill brought by him and his wife; that which was once a fraud, always will be ſo; and the accident of the woman's ſurviving the huſband will not better the caſe. Decreed the bond to be delivered up, and a perpetual injunction againſt it. *Gale* v. *Lindo*, 1 *Vernon's Reports*, 475. 1687.

From theſe impoſitions attempted by an intended wife, we will now proceed to thoſe in general which concern the fortunes, portions, or circumſtances of parties, to marriage: on this ſubject we may obſerve, that all private agreements in fraud of marriage ſettlements will be ſet aſide on application to the Court of Chancery.

It was laid down as a rule in equity by Lord Chancellor *Cowper*, That where a parent is treating for a ſon's marriage, and the ſon gives a bond without the parent's privity, to refund part of the woman's portion, it is void. *Kemp* v. *Coleman*, *Salk.* 156. 1707. As in the following caſe, where a young man was to receive 3000l. portion with

with the lady he was about to marry, privately gives a bond to her father to refund 1000l. at the end of ſeven years, ſuch a bond will be ſet aſide in a Court of Equity.

The plaintiff *Turton* being a young man, in 1710 made his addreſſes to Miſs *Benſon:* his mother and uncle were concerned in tranſacting it for him, and on the 29th of *June*, 1710, marriage articles were executed, whereby Miſs *Benſon*'s father was to give with her 3000l. as a portion, and Mrs. *Turton* was to part with 300l. *per annum* out of her jointure, to make a ſettlement on the marriage: but ſecretly, without the privity of the mother or uncle, the plaintiff *Turton* gave bond to refund 1000l. part of the portion, to Miſs *Benſon*'s father at the end of ſeven years; and ſoon after the marriage took effect. In 1713 Miſs *Benſon*'s father depoſited this bond in the hands of Sir *Theodore Janſſen* as a ſecurity for a debt, but made no actual aſſignment. In 1714 the father died, and his widow the defendant took out adminiſtration; but his debts being beyond the value of his eſtate, the creditors came to an agreement among themſelves and with her, whereby Sir *Theodore*'s whole debt was to be paid, and all *Benſon*'s effects to be turned into money, and divided equally amongſt the reſt of the creditors. During this tranſaction one of the chief creditors acquainted the plaintiff with their deſigns, and that his bond was to be aſſigned to them, who anſwered, that if Mrs. *Benſon* was to have the benefit of it, he would never pay it, but if they were, he would not diſpute it with them. In this condition the bond ſtood in 1715, when the plaintiff brought his bill againſt the adminiſtratrix to have it delivered up. When that cauſe was at hearing, the creditors bring a bill againſt the plaintiff and adminiſtratrix to diſcover colluſion. Both cauſes came on before the Maſter of the Rolls, who decreed for Mr. *Turton*, and now they come by appeal before the Chancellor.

The queſtions were, whether this bond was void in its original creation; and if ſo, whether it has not been ſince made good by ſome ſubſequent matter, either by its being transferred for ſome valuable conſideration, or by the promiſe of the plaintiff not to diſpute it.

As to the firſt, it was ſaid by the council for the plaintiff, that it was a ſort of firſt principle, and ſettled rule in this court, to make void all contracts of this nature, whereby marriage articles, ſettled by the conſent of all parties concerned, are any ways defeated by the private agreements of ſome of them. And ſeveral caſes were cited, to eſtabliſh this

this rule; *Salk.* 156, where it was laid down as a rule, that where a ſon, without the privity of the father, or parent treating the match, gives bond to refund part of the portion, it is void, *ibid.* 158.

Sir *R. Raymond* cited *Redman* v. *Redman* in 1685, in this Court, where on a treaty of marriage the friends of the lady inſiſted on the huſband's diſcharging all his debts before the marriage. There was one bond which his brother agreed to pay for him, but underhand with the privity of the lady, who was afraid of loſing the match, took a counter ſecurity of the huſband, and the marriage took effect. Afterwards the brother paid the money on the bond, the huſband died, and he ſued the counter ſecurity againſt the widow, who had taken adminiſtration. She brought her bill, and though privy to the fraud, was relieved; becauſe it was done originally to defeat a marriage agreement.

So in the caſe of *Gale* v. *Lindo*. On a treaty of marriage, the fortune of the young woman not being ſufficient for the huſband, ſhe prevails on her brother to make up the deficiency by a bond of his; but privately agrees with him, that no uſe ſhould be made of it. They were married accordingly; and the huſband dying, ſhe took out adminiſtration, and put the bond in ſuit: the brother ſues here for relief, but denied becauſe the agreement was fraudulent.

Mr. *Vernon* quoted the following caſes to the ſame purpoſe; *Lamley* v. *Hamond*, *Mich.* 1714, a mother for the advancement of her ſon in marriage agreed to part with her jointure; the ſon at the ſame time had a leaſehold eſtate of his own, which he privately contracted to aſſign over to her in conſideration of what ſhe was to ſettle upon him; after the marriage the ſon died, and his repreſentative recovered this leaſehold eſtate out of her hand by a decree of this Court, becauſe there was no mention made of that aſſignment on the marriage treaty.

Peyton v. *Bladwell*, *March* 9, 1694. Mr. *Bladwell* on the marriage of his nephew *Yelverton Peyton* with the daughter of Sir *John Roberts*, agreed to ſettle an eſtate of 200l. *per annum* on them for a jointure, and after his death to ſettle a further eſtate of 100l. *per annum* on him and his heirs. After the marriage, it was diſcovered, that there was a private agreement between him and his nephew, that he ſhould demiſe the firſt eſtate back again to *Bladwell* at 150l. *per annum* rent; and as to the reverſionary eſtate, that he ſhould releaſe that, and ſuch demiſe and releaſe were exe-

cuted accordingly: after the nephew's death, his wife and Sir *John Roberts* ſue in this court to ſet aſide this private agreement, and had a decree, whereby *Bludwell* was to account for the profits of the eſtate in poſſeſſion at the rate of 200l. *per annum* from the time of the demiſe, and to ſettle the other eſtate of 100l. *per annum* on the heirs of *Peyton*, to commence after his own death.

Sloan v. *Fowler*. On the marriage of *Fowler*'s ſon with *Sloan*'s daughter, *Fowler* by articles was to make a ſettlement, and to have the portion to himſelf; but he told his ſon the portion was not ſufficient to pay younger children's fortunes, and ſo got a bond from his ſon for a ſum of money beyond the wife's fortune: this bond came afterwards into the Court of Chancery, and was ſet aſide, becauſe it was taken without the privity of the wife's relations.

The ſecond queſtion, whether the creditors as purchaſers of this bond for a valuable conſideration, are not in a better condition than *Benſon*, was argued at length.

Lord *Chancellor*. Theſe private agreements, contrary to public tranſactions, have always been diſcouraged by this Court, even where the parties have come to be eaſed againſt their own agreement. And this is ſo far from diſtinguiſhing the preſent caſe from others, that it is a circumſtance of all the caſes that have been cited, and indeed cannot be otherwiſe, ſince the ſettlements againſt which theſe private contracts are made, are always for the benefit of the parties to the marriage. The impoſition which the Court provides againſt is not upon the perſon that marries, but on thoſe that are concerned in contracting for him; and I think this caſe as great a fraud as any that have been mentioned.

The next conſideration is, whether the creditors have a better caſe of it than *Benſon*. And firſt it is clear, that any aſſignment of *Benſon* could not have mended it; that would be to deſtroy all the power and care of this Court in caſes of this nature at once; for it is then but to aſſign over, and nothing can reach it. But he cannot properly aſſign a bond nor the penalty of it: the ſenſe and meaning of ſuch aſſignment is, that the aſſignee ſhall have all the benefit, which the aſſignor would have of it, in equity. Suppoſe a perſon aſſigns a bond that is paid, can the aſſignee take advantage of that bond? But indeed in this caſe here is no aſſignment nor any thing like it.

But in the next place, though the party doing the fraud cannot make the bond better; it is another conſideration whether the party injured cannot amend it. And I think he may as far as the conſideration of it goes; for the bond

is not abſolutely void; and though the mother is the perſon injured, yet if the ſon independent of the marriage will afterwards give a new bond for it. I think it will ſtand good againſt him. But there is nothing of that nature in the preſent caſe: there is no aſſignment to the creditors. The compoſition and agreement amongſt the creditors is beneficial to them, without any conſideration of this bond. The plaintiff's promiſe inſiſted on was without any conſideration at all: it does not appear that it induced the agreement, or any thing was done on it, but what would have been done without it. Creditors are indeed intitled to favour, but it is only with regard to the debtor's eſtate, and not other people's. I think the decree of the Maſter of the rolls is right, and ought to be affirmed, and a perpetual injunction go as to the bond.

From whence it appears that any private agreement in fraud of marriage ſettlements, are invalid and may be ſet aſide by application to the Court of Chancery. *Turton* againſt *Benſon. Chancery*, 1 *Strange's Reports*, 240. *M. T.* 6 *Geo.* I. A. D. 1719.

On a treaty of marriage between Lord *Arbuthnot*, then a minor, and the daughter of *Morriſſon*, it was agreed that *Morriſſon* ſhould pay 50,000 marks as a portion for his daughter, and a ſettlement was agreed to be made by Lord *Arbuthnot* and his friends in conſideration of that fortune. The night before the execution of the articles, *Morriſſon* prevailed on Lord *Arbuthnot* privately to ſign a writing, purporting, that the real agreement was for 40,000 marks only, and that *Morriſſon* had agreed to the contract for 50,000, upon the expreſs granting of this private obligation, by which Lord *Arbuthnot* bound himſelf to releaſe *Morriſſon* from 10,000 marks, part of the 50,000. When Lord *Arbuthnot* came of age, he brought his action to have this obligation reduced on two grounds: 1ſt. That it was granted by him whilſt a minor, without the conſent of his guardians. 2. That it was *contra fidem tabularum nuptialium*, to elicit ſuch a writing clandeſtinely, contrary to a ſolemn contract entered into in the preſence of his friends. The lords of ſeſſion ſuſtained the reaſon of reduction, and held the obligation null. Againſt their decree *Morriſſon* appealed to the houſe of lords, where the decree was affirmed, with 80l. coſts. *Morriſſon* v. *Arbuthnot*, 1 *Brown's Reports*, 548, 1728.

Mrs.

Mrs. *Lamlee* a widow, having a jointure and legacy from her deceaſed huſband, agreed to give them up on the marriage of *Lamlee* her ſon, and joined in the ſettlement, in conſideration of which 15l. a year was ſecured upon her by the ſettlement. The day however previous to the ſettlement ſhe privately got a ſecurity from her ſon for 10l. a year more. Her ſon died, and Mrs. *Lamlee* proceeded by action at law againſt the wife as the adminiſtratrix of her huſband, for the payment of this 10l. a year out of his effects. On which ſhe applied to Chancery to be relieved againſt that action; inſiſting that the mother was guilty of a fraud in making this private agreement with her ſon to have 10l. per ann. over and above the 15l. per ann. mentioned in the marriage ſettlement. And it was decreed for the ſon's widow. Several caſes were cited, from which precedents *Vernon* obſerves it may be collected, that that which is the open and public treaty and agreement upon marriage, ſhall not be leſſened, or any ways infringed by any private treaty or agreement. *Lamlee* v. *Hannan* and others, 2 *Vernon's Reports*, 499, 1705.

Where a man juſt previous to marriage binds himſelf to releaſe his wife's guardian of all accounts, the Court of Chancery will releaſe him of this obligation.

Duke *Hamilton* married the daughter and heireſs of the Lord *Gerrard*, and the articles of marriage were agreed on with great deliberation, one of which was, that duke *Hamilton* ſhould within two days after the marriage, for the peace of the family, releaſe the Lady *Gerrard* (being the mother and guardian of the young lady) all accounts of the profits in arrear of the eſtate; it being inſiſted upon by the mother at that time, and admitted by the duke, that the charges of the education of the young lady, and the intereſt paid by the mother upon a mortgage of a good part of the eſtate, which had been diſcharged by her as guardian, would come to as much as the profits of the eſtate.

In the marriage articles the duke bound himſelf in the penalty of 10,000l. to the Lady *Gerrard*, for giving the releaſe within the ſaid ſpace of two days after the marriage.

Duke *Hamilton* was ſued upon theſe articles at law, and now brought his bill in equity to be relieved againſt them, and for an account of the meſne profits in arrear.

Firſt, It was argued for the defendant, who was executor to Lady *Gerrard*, that here was no ſurpriſe or miſrepreſentation, but a very ſolemn agreement, and which tended to the peace

peace of the family. *Secondly*, That if the duke had, *after the marriage*, given ſuch releaſe, equity would not have relieved againſt it; and for the ſame reaſon it ought not to relieve againſt a covenant for the giving ſuch releaſe. *Thirdly*, that if agreements (though upon good conſideration and deliberation) could not be made, it might turn to the diſadvantage of the infants, for then no guardian could be ſecure from ſuits, which would end in diſcouraging all treaties of marriage on behalf of thoſe that were in wardſhip to them.

But, *Lord Chancellor* ſaid, that admitting there was no ſurpriſe in gaining of this covenant from Duke *Hamilton*, (as there ſeemed to be none) it being agreed upon after great deliberation, and advice of counſel on both ſides:

And admitting there had been no concealment of the matter to be accounted for, (though in this caſe the particulars of what was to be releaſed did not ſo fully appear as they might and ought to have done):

Yet this covenant to make ſuch releaſe ought to be ſet aſide, as it ſeemed to be extorted from the duke by one who had a power over the young lady courted by him; by one who had a power over her, as her parent; which ought not to have been made uſe of in this manner.

That it was as if the mother ſhould ſay, you ſhall not have my daughter, unleſs you will releaſe all accounts.

That this agreement was within the ſame reaſon as a marriage-brokage agreement, which had been ſo often condemned in equity.

A bond to give money if ſuch a marriage could be obtained, was ill: and,

By the ſame reaſon, a bond to forgive a ſum of money muſt be ill alſo.

That the caſe of a mother or guardian inſiſting upon gain for conſenting to a marriage, muſt be a much more frequent miſchief, and in all probability oftener happen than an agreement of this nature with a third perſon.

That it was moſt natural in this caſe to treat with the guardian; and to tolerate ſuch an agreement, would be paving a way to guardians to ſell infants under their wardſhip; and the greater the fortune was, the greater would be the temptation to treat in this manner with the guardian, in order to ſuch a marriage.

And though ſuch releaſe, had it been given after marriage, by the huſband, of all accounts to the guardian, might be good; it would be, becauſe if ſuch releaſe were given after marriage, it muſt be preſumed to be given freely; whereas this could not be ſuppoſed to be made freely, in regard the

duke might reaſonably apprehend, he muſt have loſt the young lady, if he had refuſed.

That this was within the common caſe of equity's relieving an heir againſt any private agreement with his father, upon the marriage of the heir; as where the father covenants to ſettle an eſtate upon the marriage, and the heir privately agrees to pay back ſo much out of it to the father; the heir is under the awe of the parent in ſuch caſe, and not ſuppoſed to act freely: for which reaſon a Court of equity relieves againſt all ſuch private agreements. And therefore relief ſhall be given in this caſe. Duke *Hamilton* and his Wife againſt Lord *Mohun*. *Chancery*, 1 *Peere Williams's Rep.* 118. 1710.

And even after the ſettlement and ſolemnization of the marriage, any ſubſequent agreements procured by improper artifices, and tending to defeat the marriage-agreement, will be reſcinded in equity.

Sir *John Bladwell* being executor of *Peyton*'s mother, and having purchaſed an eſtate which belonged to *Peyton*'s mother, he promiſed that he would not only ſettle this eſtate on *Peyton*, but alſo other lands of 300l. a year, if a convenient match could be found for *Peyton*. Accordingly in 1676 Sir *John* treated a marriage for him with the niece of Sir *John Roberts*, and *Denham* and Sir *John Roberts* agreed to give his niece 2500l. portion, to be laid out in lands after his death, and that *Bladwell* ſhould ſettle lands of the value of 300l. a year (whereof 200l. *per annum* ſhould be ſettled for the jointure of the niece) and that he would alſo ſettle other lands of the value of 100l. *per annum* on himſelf for life, remainder to *Peyton* and his heirs.

Sir *John Roberts* accordingly entered into a bond to pay 2500l. after his and his wife's death for the marriage-portion, and *Bladwell* conveyed lands which in the conveyance were ſaid to be 300l. a year. And as to 200l. a year thereof, the ſame were limited for the jointure of the wife of *Peyton*, remainder to the heirs male of their two bodies, remainder to *Peyton* in tail, remainder to him in fee. And as to the reſidue to *Peyton* in tail, remainder to him in fee. And *Bladwell* thereby covenanted, that the jointure lands were 200l. a year; and that within two years then next, he would ſettle other lands of 100l. a year, and worth 1700l. to the uſe of himſelf for life, remainder to *Peyton* and his heirs.

After the marriage, Sir *John Bladwell* prevailed on *Peyton*, who was very young, on promiſes of leaving him a greater eſtate by his will, than he had agreed to ſettle upon

upon him, and by other inſinuations to execute a writing, whereby Sir *John Bladwell* was to receive the profits of the whole eſtate, allowing *Peyton* only 120l. a year, and to aſſign over to him *Roberts*'s bond, and alſo to releaſe or diſcharge the agreement for the ſettling the 100l. *per annum* on him and his heirs after the death of *Bladwell*.

Sir *John Bladwell* died, and *Wm. Bladwell* was his heir and executor, againſt whom *Peyton* and his wife, Sir *John Roberts* and *Nathaniel Denham* now file their bill to be relieved againſt theſe agreements, which had been extorted from *Peyton*, and to have the jointure made good, the lands ſettled for the jointure by Sir *John Bladwell* not being of the value of 200l. a year.

After long debate the Lord *Keeper* decreed, That the defendant *Bladwell*, notwithſtanding the agreement with *Peyton*, ſhould account for all the profits of the eſtate, which Sir *John Bladwell* had been in poſſeſſion of under that agreement, over and above the 120l. *per annum* and the Maſter was to ſee what was the value of the jointure land at the time of the ſettlement: and the defendant *Bladwell* was decreed to make good ſo much as the jointure lands fell ſhort of 200l. *per annum* at the time of the ſettlement made. And Sir *John Bladwell* having deviſed ſome lands by his will to *Peyton*, the defendant was decreed to make up thoſe lands 100l. a year, and to ſettle them on *Peyton* and his heirs, according to the marriage agreement.

And although it had been ſtrongly inſiſted by *Bladwell*'s counſel, that the agreement being to ſettle 100l. *per annum* on *Peyton* and his heirs, he had power to releaſe and diſcharge that agreement, and there was no benefit thereby intended to the wife or iſſue of that marriage: and in caſe the ſettlement had been actually made, it had been in *Peyton*'s power to have ſold, or given away thoſe lands: the ſettlement being to be made to him and his heirs after the death of Sir *John Bladwell*, and therefore he might well releaſe the agreement, as to that 100l. *per annum*, and no one could be ſaid to be injured by it, no more than if he had deviſed away or ſold thoſe lands.

Yet the Court declared its deteſtation of ſuch underhand agreements; and that it was a deceit and fraud as to Sir *John Roberts*, who was drawn in to give a great portion with his niece, in expectation of a ſettlement adequate to it, which by this means is to be fruſtrated: for though *Peyton* could have diſpoſed of the lands which were to have been ſettled on him and his heirs, yet that is frequently done in many ſettlements, the father by that means being left at liberty to provide for his younger chil-

children, and to reward them moſt, that behave themſelves beſt: but ſtill there is a benefit intended to the iſſue of the marriage; and it is part of the conſideration for which the portion was given, and therefore declared this underhand agreement and releaſe to be fraudulent, and ſet the ſame aſide, and decreed the agreement to be performed, as to the 100l. *per annum*. *Peyton and Roberts and others*, v. *Bladwell*, 1 *Vernon's Reports*, 240. 1648.

As all private and underhand agreements contrary to the open and public ſettlements on marriage may be ſet aſide in Chancery, yet if an underhand agreement on a ſubſequent marriage, tend to ſtrengthen the ſettlements made in a former marriage, it will not be ſet aſide, for the former marriage, being firſt in point of time, ought to have the preference.

John Roberts the father ſettled a large part of his eſtate on his ſon *David Roberts*, on his marriage with Miſs *Meller* who had a portion of 4000l. the father reſerving to himſelf a power to charge on the eſtate ſo ſettled on his ſon, a jointure of 200l. a year on any wife that he the father might afterwards marry, but in caſe ſuch a charge be made, the father was to pay his ſon 1000l.

After this *Roberts* the father entered into a treaty of marriage with *Catharine Barker*, who had a portion of 3000l. and propoſed to charge the eſtate ſettled on his ſon with the 200l. a year, as a jointure for *Catharine*: but the father not being able to pay the 1000l. as ſtipulated, the match between him and *Catharine* was broken off. The ſon being informed of this, he agreed to releaſe his father from the payment of the 1000l. and wrote ſeveral letters to him to that purpoſe: but ſoon after the ſon changed his mind and inſiſted that if he releaſed this 1000l. his father ſhould give him a bond for the payment of it, ſoon after the marriage; which the father conſented to. Neither the wives or relations of either party had any knowledge of theſe tranſactions. After *Roberts* the father's marriage with *Catharine*, the ſon ſued him on the bond for 1000l. the father applied to the Court of Chancery to be relieved from the payment of it as an underhand agreement in fraud of marriage.

On behalf of *John Roberts* the father, and *Catharine* his wife it was inſiſted, that it was plain this bond for the 1000l. in queſtion, was obtained from the father without the privity of *Catharine* his wife, or any of her relations; that it ſeemed as plain, that neither *Catharine* nor any of her relations,

lations, would have conſented to the match, had they known of this underhand bond being given by the father to his ſon; that whenever any of theſe underhand agreements on marriage came in judgment, the Court conſtantly declared an abhorrence of them, as being in fraud of the marriage, and generally tending to make the marriage unhappy; and every thing which had, or ſeemed likely to have, thoſe effects, ought highly to be diſcouraged.

That for this reaſon equity is careful that the open and public contract made upon the marriage ſhould take place, and will not ſuffer that to be infringed by any clandeſtine and private agreement whatever; nay, ſo odious in a Court of equity are all ſecret and underhand dealings, as to intitle to relief even the huſband himſelf, though party to the fraud and conſenting to the agreement: but in this caſe, the bond given by the huſband for the payment of the money, did in conſequence affect the wife: 1000l. was a conſiderable ſum of money, for which, when the huſband ſhould be called upon he muſt be diſabled thereby from maintaining his wife, at leaſt in as comfortable a manner as otherwiſe he might, and probably would have done. And therefore it was proper the wife ſhould be, as here ſhe was, a co-plaintiff, in order to conteſt and ſet aſide the bond.

That it was true the bond in queſtion, was only for 1000l. but it might have been for 10,000l. and if the preſent bond for 1000l. were allowed to be good, by the ſame reaſon a bond for 10,000l. had been good alſo, which muſt utterly have incapacitated the father from maintaining his wife, who muſt in ſuch caſe have gone back to, and been a clog upon, her relations, although ſhe brought ſo conſiderable a portion as 3000l.

It is admitted to be in proof, that *Roberts* the father, did in all outward appearance execute this bond freely: but this was not at all material; for ſtill it was a clandeſtine bond, given without the privity of the wife or her relations, and would, as before obſerved, if diſcovered, in all probability have prevented the marriage.

That innumerable precedents might be alleged, where the huſband not only was paſſive in conſenting to the underhand agreement, but had alſo been active in encouraging it; and yet had been relieved againſt his own act, fraud, and contrivance; which doubtleſs was done in favour to the wife, and to the end her huſband might not thereby be diſabled from the better maintaining her, who in the preſent caſe was not pretended to have known any thing of

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That innumerable precedents might be alleged, where the huſband not only was paſſive in conſenting to the underhand agreement, but had alſo been active in encouraging it; and yet had been relieved againſt his own act, fraud, and contrivance; which doubtleſs was done in favour to the wife, and to the end her huſband might not thereby be diſabled from the better maintaining her, who in the preſent caſe was not pretended to have known any thing of

the bond, but to have been intirely innocent, and free from the leaſt imputation of fraud.

And as to the jointure made upon the wife in this caſe, it was ſaid to be a hard bargain, being but a jointure of 200l. *per annum*, for a portion of 3000l. whereas it is uſual to ſettle 100l. *per annum* for every 1000l. and this 200l. *per annum* lay at a great diſtance in *Wales* without any the leaſt proviſion for the children of the marriage.

That with regard to the father's power reſerved to him to make a jointure, it was obſervable, he was made to pay 1000l. for it, for a power to limit only an eſtate for life, and this in reverſion too, after another life: ſo that if *Roberts* the father ſhould happen to ſurvive his wife, it would have been paid for nothing; that it was at the rate of five year's purchaſe, which was holding him to rigorous terms, eſpecially when at the ſame time the ſon was intruſted with a power of making double that jointure, being allowed to make a jointure of 400l. *per annum*, without paying one farthing of it.

It was admitted this was a bond given by the father to the ſon, not by the ſon to the father; ſo that the uſual argument of its having been given by compulſion or coercion might ſeem not applicable in this caſe: but ſtill the fraud was not the leſs upon *Catharine* his wife, who was intirely innocent, and kept in ignorance of it: the wife was equally a ſufferer, and her relations impoſed on to as great a degree as if ſhe had been the wife of the ſon, not of the father; and as to authorities, they were very ſtrong as in *Redman*'s caſe; and in *Gale* verſus *Lindo*; in which caſes the wife as well as the huſband was *particeps criminis*, and yet relieved; the ſame in *Turton* verſus *Benſon*, wherefore it was prayed that the Court would grant a perpetual injunction. On the other ſide it was argued, that *Roberts* the father was not only party to what was here called the fraud, in giving this underhand bond for the payment of the 1000l. but that upon *Roberts* the ſon's marriage, when he reſerved to himſelf a power to make a jointure of 200l. to any wife he ſhould thereafter marry, he himſelf made a private agreement with his ſon, that the latter ſhould releaſe this 1000l. to him; and the very bill ſets forth, that *Roberts* the ſon at the time when he made his marriage-ſettlement, did declare before ſeveral perſons, that he would not inſiſt upon ſuch claim, nor expect payment of the 1000l.

So that all that could be alledged in favour of the ſecond wife of *Roberts* the father, might likewiſe be ſaid on behalf

half of the wife of *Roberts* the ſon; and if it ſhould be inſiſted to be injurious to *Catharine*, the ſecond wife of the father, that this private agreement ſhould take place; it muſt be allowed to be no leſs prejudicial to the wife of the ſon, that the private underhand agreement for the releaſing or not inſiſting on the payment of the 1000l. on the father's making a jointure on the ſecond wife, ſhould hold good; and it was plain that the agreement on the marriage of the ſon, that the father, if he ſettled a jointure on the ſecond wife, ſhould pay 1000l. was made on a valuable conſideration, and with a view to prevent the father's marrying again; then if *Roberts* the father, had not an undoubted equity on his ſide, and the law ſhould be in favour of *Roberts* the ſon, (as clearly it was, the bond being good at law) the ſon's bond muſt prevail.

That as it appeared from the ſon's ſettlement, that this proviſion was made at the inſtance of the firſt wife's friends, that if the father married again, he ſhould on his making a jointure on a ſecond wife, pay 1000l. to the ſon; the ſecond wife or her friends ought to have applied to the relations and truſtees under the firſt ſettlement, and to have given them notice of this intended releaſe of the 1000l. they being in ſome meaſure, in equity, intereſted therein.

Here the Court propoſed it to *Roberts* the father's counſel, whether they had known or could cite any precedent of an underhand agreement to give a bond on a marriage being ſet aſide, which when done, would be injurious to a former agreement made upon a valuable conſideration?

To which it was anſwered, That whatever agreement or promiſe the ſon might make to the father of his not inſiſting to be paid this 1000l. on the father's ſecond marriage, yet it did not appear that the father ever required a bond or covenant from the ſon to oblige him to it; as to any verbal agreement to that purpoſe, ſuppoſing there were any ſuch, the ſon muſt know it would not be binding; and it would be hard that this agreement for the father's giving a bond to pay this 1000l. to the ſon (which was plainly an underhand bond) ſhould be binding to the prejudice of the father's ſecond wife, who brought a good portion, and was at leaſt herſelf innocent of any fraud, whatever imputation of that kind might lie on the huſband.

Maſter of the Rolls. It is moſt true that equity does abhor all underhand agreements in caſes of marriage; and perhaps this may be the only inſtance in equity, where a perſon, though *particeps criminis*, ſhall yet be allowed to avoid his own acts. Marriages ought to be encouraged, to which

end, the open and public agreements on marriage-treaties ſhould be ſupported and made good. It is not uſual in caſes of this nature for the wife to be made a co-plaintiff with the huſband, in order to avoid the agreement, but the huſband has been relieved on a bill brought by him alone: and therefore, I do not think that the wife's joining in this bill, at all alters the caſe, neither does it make any difference, that the father looks here to be relieved againſt the bond, no evidence has been given of his having made uſe of his paternal authority, and the father is as much at liberty to marry again as the ſon.

But what I take to be material is, that whatever arguments can be made uſe of in favour of *Catharine*, the father's ſecond wife, or of her huſband, to prove that the father ought to be diſcharged of the bond for payment of the 1000l. the very ſame arguments may be urged on behalf of the ſon and his wife, to prove that it ought to be paid. Thus ſuppoſing it to be an hardſhip upon the father's ſecond wife, that her huſband ſhould be forced to pay this 1000l. in breach of the public and open agreement made by the ſon; is it not equally an hardſhip upon the ſon's wife, and as much a violation of the open and fair agreement made on her marriage, that the 1000l. ſhould not be paid upon the father's making a ſecond jointure? The conſequence of which will be, that as the agreement made on the ſon's marriage was the firſt, it ought to have the preference: *qui prior eſt in tempore, potior eſt in jure.*

Further: on the face of the bill it is alleged, that the ſon on his marriage, and when his father agreed to pay the 1000l. on his making a jointure to a ſecond wife, engaged not to inſiſt on, or expect, the payment thereof; which ſhews it was intended as a fraud upon the ſon's wife, or her relations; and the father's agreeing to pay the 1000l. on ſuch contingency, might be ſome inducement to the ſon's wife and her relations to come into the match. But if this had not been charged in the bill, it ſtill appears on the merits, that *Roberts* the ſon and his wife are purchaſers of the 1000l. in caſe of the father's marrying again and making ſuch jointure as he has done. Wherefore ſince the payment of this 1000l. by *Roberts* the father, may as much contribute to the comfortable ſubſiſtence of *Roberts* the ſon and his wife, as the non-payment of it may conduce to the comfortable living of the father and his wife; and as by means of this bond, *Roberts* the ſon has the law on his ſide, I think the bond muſt be paid, with intereſt and coſts.

John

John Roberts and *Catharine* his wife v. *David Roberts* his ſon, 3 *Peere Williams's Reports*, 66. 1730.

Pitcairn a clergyman, had a ſon who was paying his addreſſes to *Rebecca Grovenor*, niece of *Felix Chambers*: there being ſome objection as to circumſtances, and *Pitcairn* the father, who had but 200l. a year benefice, being willing, as far as he was able, to give into his ſon's inclinations for the young woman, who had no fortune, told his ſon he would agree to pay 100l. a year, and with this propoſal the ſon waited upon her at her uncle's.

She then roſe in her demand, by ſaying that her expectations were from her uncle, having nothing of her own: that her uncle would be induced to do more for her, if his father did more for him, and therefore ſhe propoſed that his father ſhould give bond for the payment of 150l. a year inſtead of 100l. *Pitcairn* the father was angry at this propoſal, and the treaty was in danger of being broke off: but however, for the purpoſe of deceiving the uncle into liberality, *Pitcairn* executed a bond for the payment of 150l. a year while he lived, for their lives: but it was underſtood among them that 100l. was only to be paid by the father. The marriage was ſolemnized, and during the life of the huſband 100l. a year only was paid, he died, and after his death his widow ſo far from conſidering herſelf as entitled to 150l. continued to receive only the 100l. and inſiſted on no more.

The bond however was now put in ſuit againſt *Pitcairn* in order to recover at law the 150l. a year, and alſo the arrears of that annuity.

Pitcairn applies to a Court of equity to be relieved from the payment of it; on the ground, that though the bond imported on the face of it an annuity of 150l. yet for reaſons given in the tranſaction, the actual agreement was for 100l. only.

It was objected that *Pitcairn* could not be ſuffered to give parol evidence [a] of this agreement: that the Court notwithſtanding the ſtatute of frauds ſometimes admits parol evidence, as where the ſtatute would otherwiſe be the occaſion of fraud: but it is never admitted to contradict the written agreement, and to ſupport a fallacious private one, entered into to deceive the perſon who had the diſpoſal of the wife, as here; this bill being to eſtabliſh a fraud to which *Pitcairn*

[a] *Verbal* contradiſtinguiſhed from *written* evidence.

cairn himſelf is a party. *Necis artifices arte perire ſua*, a good rule in morality. It is of public concern. There is no inſtance where a written agreement on marriage notoriouſly between the parties, that this Court ever admitted to prove a private clandeſtine treaty that the agreement ſhould not avail, what on the face it imported.

Sir John Strange, Maſter of the Rolls. The ſtatute of frauds ſays all contracts in conſideration of marriage ſhall be in writing, otherwiſe void, *i.e.* if people by parol only treat for a ſum of money to be advanced on one ſide, and an eſtate ſettled on the other, if not reduced into writing, it ſhall be void. However there may be caſes wherein Courts of law and equity (and the rule is the ſame in both) will let in circumſtantial evidence to prevent that fraud taking place, which would ariſe from inſiſting, that ſomething was got in writing, which would deprive the party of the benefit of detecting that fraud. On a bill for a ſpecific performance of a written agreement, the defendant may inſiſt, it has been ſince diſcharged merely by parol between the parties; and that defence will be received. 1 *Ver.* 240. The preſent evidence is not to contradict the import of the bond on the face of it, but to ſhew that notwithſtanding that, the actual agreement was that it ſhould be but 100l. which is expreſsly contradicting the agreement itſelf: but it is admitted, the written inſtrument is, as it was deſigned, to appear at the original tranſaction. It differs therefore from the caſes where you come on the conſtruction of the inſtrument to abate, what ariſes on the force of the face of it. This is in fact ſetting up a new agreement. I remember a caſe of *South-Sea Company* v. *D'Oliff*, where by agreement the *Company* was not bound to anſwer for any irregularity by ſupercargoes, unleſs information was given in two months after return home. The inſtrument was not drawn up until on board the ſhip and in a great hurry, and executed there by the party; who, when he got out to ſea, and read it over, found it was ſix months inſtead of two; and brought a bill to be relieved againſt that variation in the inſtrument. Lord *King* ſent it to be tried by a jury on a queſtion, whether it was the original agreement, it ſhould be two inſtead of ſix months. The verdict given was, that the agreement was deſigned to be in two; and a decree in conſequence of that to relieve the party againſt any difficulty by that variation. That is a ſtronger caſe than this; ſetting up parol evidence to contradict the very words of the written agreement itſelf; but it was conſidered that the variation would be a fraud, and therefore the Court which

was

was to relieve againſt fraud, muſt admit it; otherwiſe if it could be got in black and white, there would be no relief: from this caſe therefore and others, it is proper to receive this evidence; the weight of it will be afterwards for conſideration.

Pitcairn now attempted to make out his own caſe, which was as related before, and on that foundation he inſiſted on this agreement in contradiction to the bond; and that his ſon's wife ſhould not avail herſelf from any thing ariſing on the face of the bond againſt her own propoſal, or reject the parol which was the true agreement. It was begging the queſtion to ſay, *Pitcairn* came into Court on the foot of fraud, not of equity. The uncle was not *in loco parentis;* for ſhe had a mother alive at the time; ſhe was nominally a truſtee in the bond, and ſo not an intereſted party. This agreement was with the privity of every party concerned in the marriage-agreement, the father, ſon, and intended wife; the uncle whom it was calculated to deceive, having neither contracted or given any thing on his part, it differs from all caſes on that head in the material circumſtance, on which they all turn, that it is a deceit to a party. The uncle then cannot be ſaid to be deceived. Though he has by his will made a proviſion for his niece, the huſband is not at all benefited thereby; for it is to her ſeparate uſe. This is like the caſe, where two contract for a ſale, and the purchaſer for the ſake of appearances deſires a larger ſum than he really gave may be inſerted in the conveyance: ſhould the vender afterwards proſecute at law for the whole money mentioned in the conveyance, a Court of equity on proof that the real agreement was ſuch, would give relief, and ſuffer no more than the real ſum bargained for to be given.

In reply it was ſaid that this bill is to eſtabliſh a pretended underhand agreement on treaty of marriage to reduce the public open agreement, to carry an appearance to the uncle with whom the treaty was, and on whoſe regulation of it the marriage itſelf depended, ſo that he was the proper party with whom to treat, and not only nominally a truſtee. There is a material letter during the treaty from *Pitcairn* to his ſon, where it appears under *Pitcairn*'s own hand, that the uncle had promiſed to do ſomething on his part, though *Pitcairn* thought better not to have it inſerted, but to truſt to his generoſity, concluding with his bidding his ſon go on to marry, and leave the management of the uncle to him. Falſe inducements, and ſpecious appearances, are a fraud on the perſon treated

with

with on that foundation. There is nothing in writing to alter the original bond ſtill in force, written evidence at the time cannot err, nor is liable to defect of memory as parol evidence, which is hardly poſſible to remember preciſely at any diſtance. On that principle was the ſtatute of frauds made; which, it would be better and ſafer, if never broke in upon, notwithſtanding the ſpecious argument that it may in ſome inſtances cover fraud. Though a third perſon's being defrauded and induced to give more than he otherwiſe would, is an ingredient, that is not the principle upon which the Court goes; which is not to endure any thing underhand, derogatory to the public agreement; but this is the firſt time ſuch was ever endeavoured to be eſtabliſhed by a bill. Sir *Joſeph Jekyll* looked on young people paying their addreſſes in way of marriage as intoxicated, and not *ſui juris*. Inſtances have been even of parties to the tranſaction being relieved againſt the underhand agreement, though made by themſelves.

Sir John Strange decreed as follows. The firſt queſtion is whether the parol agreement, on which *Pitcairn* inſiſts as the ground and foundation of relief prayed, is in point of fact made out to the ſatisfaction of the Court? and I think, it is ſufficiently eſtabliſhed. But however ſtrongly this is eſtabliſhed, the next queſtion is whether on the whole *Pitcairn* is entitled in a Court of equity to the relief prayed? The general rule as to theſe private agreements is certainly, and admitted to be this; where any ſuch ſtipulation between ſome of the parties is to derive or draw in any other party to the agreement to do more than he otherwiſe would, this Court looks on it in light of a fraud, and will relieve againſt it. But it is ſaid, this differs, the uncle neither contracting nor giving any thing, which leads to the queſtion, in what light he is to be conſidered? Laying all the tranſaction together, eſpecially the letters of *Pitcairn*, I am of opinion, the uncle is to be conſidered as a material party to the agreement on the marriage; and as one intended to be impoſed on by the private agreement of the others. His niece's whole dependence was on him; ſhe lived and continued to live with him to the time of his death; and though probably ſhe had a mother then living, yet it was not in her power to do any thing for her; ſo that the uncle is treated with as proper to intervene *in loco parentis*. It is true, he is only named as one of the two obligees; nor could he be otherwiſe a party. The bond being only executed by *Pitcairn*, the aſſent of the uncle cannot be ſhewn on the inſtrument itſelf: but he muſt be neceſſarily apprized

prized of it. But from *Pitcairn*'s letter to his ſon during the treaty, no one can doubt but that he conſidered himſelf as treating with a perſon who was in ſome ſhape or other to provide for his niece out of his own pocket. It ſhews clearly, the uncle promiſed to do ſomething; and it was *Pitcairn*'s own choice that this promiſe was not inſerted in the written agreement between the parties; truſting to the honour of the uncle, whom the ſon was to leave to the management of *Pitcairn* himſelf; and what the uncle did, ſhews *Pitcairn* acted wiſely in truſting thereto, they living with him until his death, and by his will gave almoſt every thing unto his niece, very amply anſwering *Pitcairn*'s expectations: though given to her ſeparate uſe, that is notwithſtanding to the benefit of an huſband, leſſening his expence: and by the will the children, had there been any, ſufficiently provided for. If the uncle had contracted to give ever ſo little, the private agreement could not be ſupported. But ſhall the father avail himſelf of that circumſtance of its being left out of the written agreement, when it was by his own choice? The whole ought then to be conſidered in equity as an open tranſaction between four parties for a treaty of marriage, and a ſecret tranſaction between three of them only in deceit of the fourth. I do not ſee why it is not like the caſe of Sir *George Maxwell*, *Eq. Ab.* 19. where a marriage agreement was deſigned to be put into writing, as the ſtatute requires, but by fraud of one of the parties it is prevented; the Court does not ſuffer the party who was the occaſion thereof, to come and inſiſt it was void. The Court ſays, it was a fraud, and owing to him, and he ſhall not claim the benefit of the ſtatute. As I ſee it therefore in this light, (and in that I principally ground myſelf on the letter of *Pitcairn*) I cannot be juſtified in lending the aid of this Court in carrying it into execution. That it was calculated to deceive, is avowed on all ſides: whether *Pitcairn* was drawn in by the girl or not, is not very clear; it rather ſeems he was. One of the parties then to this, which I look on as a fraudulent agreement, cannot be allowed to come here to have it carried into execution for his benefit. Conſequently the bill, ſo far as it ſeeks to eſtabliſh that agreement, or to be relieved againſt the payment of 150l. for the time to come, muſt be diſmiſſed, but conſidering the behaviour of the niece, the propoſer of the fraud, and the merits in *Pitcairn*'s caſe of which ſhe is left to reap the benefit (for which I am really ſorry) and conſidering the anſwer ſhe put in, I do not think proper to give her the

coſts

coſts of the diſmiſſion. *Pitcairn* muſt alſo pay the arrears in a certain time. *Pitcairn* v. *Oſbourne*. 2 *Veſey's Reports*, 375. 1751.

Where a man is about to be married, but the father of the lady withholds his conſent becauſe the intended huſband is indebted; here if in order to remove the father's objection a third perſon undertake to be reſponſible for this debt, but takes a private obligation from the intended huſband to indemnify ſuch third perſon from the debt, and the marriage takes place; ſuch perſon is liable to the debt, and the private indemnity taken from the huſband will be ſet aſide.

Charles Redman being in a treaty of marriage with a young woman, her father would not conſent to the match, becauſe *Charles* was indebted in a bond of 200l. to one *Bryan*: to remove this objection *Henry Redman* (a younger brother of *Charles*) agreed to make himſelf reſponſible for this debt to *Bryan*, and for that purpoſe he gave *Bryan* his own bond for 200l. and the other bond from *Charles* was cancelled: but in conſideration of *Henry*'s doing this *Charles* gave *Henry* a bond to indemnify him againſt this debt: this was a contrivance of the young woman, who being in love with *Charles*, did it to ſatisfy her father, who conſented to the match on the ſuppoſition that *Charles* would not be liable for the 200l. After the marriage had taken effect *Charles* died, and *Henry* ſued his widow as adminiſtratrix to her huſband, to recover the 200l. out of his effects, on the bond which he had given him to indemnify him againſt the debt to *Bryan*. The widow applied for relief to Chancery.

On behalf of *Henry Redman*, his counſel inſiſted, that *Henry* became bound in this bond voluntarily, having no manner of obligation on him to pay this debt for his elder brother, but it was done at the inſtance and requeſt of his brother and the now widow, who contrived this means to bring the match about; and inſiſted that if *Charles* himſelf had been plaintiff, he ſhould not have been relieved againſt this counter bond: and his adminiſtratrix, who was privy to this tranſaction, could have no better right than *Charles* had.

Lord *Chancellor*. This is a plain fraud, and by this contrivance the widow's father was drawn in to give the greater portion; and he abſolutely refuſed to marry his daughter, till *Charles* was made a clear man, and particularly diſcharged

charged of this very debt: and though *Henry* had no obligation on him to become bound for his elder brother's debt, yet it was all one to *Henry Redman*'s father which way that became diſcharged; but that was to be firſt done, let it be one way or other: and declared, that in caſe *Charles* himſelf had been the plaintiff he ſhould have been relieved. *Redman* v. *Redman*, 1 *Vernon's Reports*, 348. 1685.

In conformity to the principle of the preceding caſe it has been determined that where a man is about to be married, and owes a ſum of money to a creditor, who he deſires will conceal it from the knowledge of the lady's father; if ſuch creditor does conceal it, and on being queſtioned reſpecting it, denies that there is any debt due, and the marriage takes place—the creditor will never be ſuffered to recover his debt.

In *June* 1777, the plaintiff *Neville*, who was the ſon and heir apparent of Lord *Abergavenny*, became acquainted with *John Wilkinſon*, the defendant, who was an attorney, and they had ſeveral tranſactions together, the principal object of which was the raiſing money to ſupply Mr. *Neville*'s neceſſities.

In *June* 1781, Mr. *Neville* having paid his addreſſes to marry the daughter of Mr. *Robinſon*, *Wilkinſon* the attorney was requeſted by Mr. *Neville* to make up a ſtate of his affairs to lay before Mr. *Robinſon*, which *Wilkinſon* did to the amount of 26,000l. including demands of *Wilkinſon* on Mr. *Neville*, to a conſiderable amount, and meetings were had to ſettle this ſtate of debts between *Neville* and *Wilkinſon*, and *Butcher* another perſon employed by *Neville*, and who had a conſiderable demand on *Neville*; and in the courſe of their converſations, it appeared that the demands of *Butcher* were ſtated below their real amount, and that there were debts not included in the amount; but *Neville* repreſented to *Wilkinſon* and *Butcher*, that he had aſſured *Robinſon*, that his debts in the whole did not exceed 18,000l. and that he was very ſure, if *Robinſon* knew that his debts were ſo enormous, he would heſitate conſenting to the marriage; although he was ſure, after the marriage had taken place, that he would pay the full amount of *Neville*'s debts; that he had obtained the conſent of the lady and her friends, and of his friends; that he ſhould be unhappy and ruined unleſs the marriage took effect; and that he ſaw no other mode of effecting it, but by perſuading *Wilkinſon* to forego making a claim of his whole debt,

debt, due to him from *Neville*, and by perſuading *Butcher* to forego claiming a part of his demand. *Wilkinſon* was prevailed upon by the intreaties of *Neville*, to conceal his debt from Mr. *Robinſon*, and to omit the ſame in the amount of the debts of *Neville*, to be made out and delivered to Mr. *Robinſon*; having received from *Neville* aſſurances that the debt due to him ſhould be paid or conſiderably reduced out of the income which his father Lord *Abergavenny*, and Mr. *Robinſon* had agreed to allow him; and that *Robinſon* had agreed to give *Neville* 50,000l. with his daughter, and to make his annual income 5000l. a year. An account was delivered by *Wilkinſon* to *Neville*, of money received and paid by *Wilkinſon*, in annuity tranſactions, which was examined by Mr. *Atkinſon*, as a friend of Mr. *Robinſon*, but not finally ſettled; and particularly *Wilkinſon* told *Atkinſon*, that he had a conſiderable demand on *Neville*, for buſineſs done in his profeſſion, and for money expended on his buſineſs; he was then aſked by *Atkinſon*, if he had any other demands on *Neville*, and ſaid he had not, in purſuance of his promiſe to *Neville* to conceal his demand from *Robinſon*.

On the 4th of *October* 1781, Mr. *Neville* was married to Miſs *Robinſon*, and the fact was, (though the anſwer of *Wilkinſon* denied any knowledge of it,) that, by indenture *September* 29, 1781, previous to the marriage it was declared that a ſum of 18,000l. paid into the hands of a banker, in the name of *Robinſon* and *Shelly*, and mentioned in the ſettlement on the marriage of Mr. *Neville* and Miſs *Robinſon*, ſhould be applied to redeem the annuities, and pay the debts contracted by Mr. *Neville* previous to his marriage, and that, if there ſhould be a ſurplus, it ſhould be paid to truſtees in the ſettlement. After the marriage the 18,000l. was applied in diſcharging demands on Mr. *Neville*, together with a further ſum advanced by Mr. *Atkinſon* for that purpoſe, and *Wilkinſon* was employed to pay ſeveral of thoſe demands, conſiſting of tradeſmen's bills, he alſo paid to a perſon who lived with Mr. *Neville*, before his marriage 417l. which was repaid by Mr. *Atkinſon*, and *Wilkinſon* on this occaſion refuſing to give a receipt in full of all demands, was aſked by Mr. *Atkinſon* if he had any other demands, and he ſaid he had not.

After theſe tranſactions *Wilkinſon* claimed of *Neville* a debt to the amount of 4,758l. 16s. 6d. excluſive of intereſt, and alſo excluſive of his demand for his fees and diſburſements in buſineſs, and it appeared that he had a bond from *Neville* for 1000l. in part ſecurity for his demands; part of

of this demand was for money advanced ſubſequent to the marriage.

A bill was filed againſt *Wilkinſon* praying a general account, offering to pay what, if any thing, ſhould appear juſtly due, that the bond might be delivered up, and founded a claim to this relief, on ſuggeſtions that the demand of *Wilkinſon* was not in its origin juſt, rather than upon the ground of fraud, in the concealment, by *Wilkinſon* of his demand on the plaintiff *Neville*.

Upon the anſwer, a motion was made for an injunction, founded on the ground of fraud, and the caſes of *Turton* and *Benſon*, and *Redman* and *Redman*, (ante) were cited and relied on.

The counſel in behalf of *Wilkinſon* contended that this caſe differed from any former caſe: it was admitted, that *Wilkinſon*'s demands in the way of buſineſs and for money advanced ſince the marriage, were indiſputable; and that the only doubt was, as to the debt due to *Wilkinſon* before the marriage, which it was alledged had been fraudulently concealed from *Robinſon*, to induce him to conſent to the marriage. With reſpect to this demand, he endeavoured to diſtinguiſh the caſe of *Wilkinſon* from any caſe apparently ſimilar which had been before the Court; inſiſting, that theſe caſes had either been where the conſideration of the original contract was bad, as marriage-brokage bonds; or they had been where a parent had bargained for his child, upon an article in which he had been deceived; but in this caſe the original contract was good, as the fairneſs of *Wilkinſon*'s demand was not diſputed, and it did not appear that Mr. *Robinſon* had been deceived in an article, upon which he had bargained in behalf of his daughter, and it did not appear that Mr. *Robinſon* had made the amount of the debts of *Neville* a poſitive condition in the treaty for the marriage.

In order to found the injury, it ought to appear from the anſwer.

1. That in point of fact Mr. *Robinſon* did make it a term of agreement that Mr. *Neville*'s debts amounted only to 18,000l.

2. That *Wilkinſon* knew that he ſo did.

3. That knowing this, *Wilkinſon* had conveyed to *Robinſon* a miſrepreſentation, under the influence of which *Robinſon* had actually agreed.

Lord *Chancellor Thurlow*, had at firſt conſiderable doubts; but after looking into the caſes with conſiderable attention, he delivered his opinion to the following effect:

He

He obſerved, that it had been attempted to diſtinguiſh this caſe from any of the former caſes apparently ſimilar, upon this ground, that in all thoſe caſes the parent had ſtated an article in which he had been deceived, and had bargained upon that article; here *Wilkinſon* confeſſed a confederacy to cheat *Robinſon*, that *Neville* had told him, that he had preſented his debts to *Robinſon* as not exceeding 18,000l. and that he was ſure that, if *Robinſon* knew the amount of his debts, he would heſitate conſenting to the marriage; but *non conſtat* that *Robinſon* had ever inſiſted that 18,000l. ſhould be the extent of the debts of *Neville*. His lordſhip ſaid, he could not make the diſtinction; he would not lay it down as a rule that fraud, in caſes of this nature, muſt be upon an article expreſsly contracted for. If any man, upon a treaty for any contract, will make a falſe repreſentation, by means of which he puts the perſon bargaining under a miſtake upon the terms of bargain, it is a fraud, it miſleads the parties contracting, on the ſubject of the contract. It has been ſaid here is no evidence of actual fraud on *Robinſon*, but only an admiſſion of a combination to defraud him. A Court of juſtice would make itſelf ridiculous, if it permitted ſuch a diſtinction; miſrepreſentation of circumſtances is admitted, and there is poſitively a deception. His lordſhip then adverted to the caſe of *Gale* v. *Lindo*, and obſerved, that there, upon a treaty for marriage, the woman not having ſo great a portion as the man inſiſted upon, prevailed upon her brother to let her have 160l. to make up her portion, and gave him a bond for repayment of it: the marriage was had; and the huſband, who knew nothing of the bond, died without iſſue: the wife ſurvived, and after her death, and the death of the brother, the defendant, his executor, put the bond in ſuit againſt the plaintiff, her executor. The bond was there ſet aſide in her favour; a bond given by herſelf, and ſued againſt herſelf, that is againſt her repreſentative. A quere is put by the reporter, if the condition of the bond had been, that in caſe the woman ſurvived her huſband, that ſhe ſhould pay it, whether ſhe could have been relieved: his lordſhip thought this would have made no difference: the principle, he obſerved, on which all thoſe caſes had been decided, was, that faith in ſuch contracts was ſo eſſential to the happineſs both of the parents and children, that whoever treats fraudulently on ſuch an occaſion, ſhall not only not gain, but even loſe by it. He then obſerved upon the caſes in which it had been determined, that upon a criminal act, a perſon who was *par-*

ticeps

ticeps criminis, could not be relieved in a Court of juſtice; and particularly the caſe of *Tomkins* v. *Barnett*, 1 *Salk.* 22, and *Skinner* 411, which was an action of *indebitatus aſſumpſit*, by a perſon who had paid money on an uſurious contract, againſt the perſon who had received it. This he obſerved, remains in the books, and is cited; but has been departed from in point of principle and application: and to ſhew this, he mentioned the caſe of *Aſtley* v. *Reynolds*, *Strange*, 915, which was an action brought againſt a pawnbroker for taking more than legal intereſt, and *Moſes* v. *Macferlan*, before Lord *Mansfield*, 2 *Burrow*, 1005, and *Wilkinſon* v. *Kitchen*, Lord *Raymond*, 89, which was an action of *indebitatus aſſumpſit* for 70l. given by the plaintiff, who was committed on two indictmentss for clipping, &c. to the defendant, a *Newgate* ſolicitor, to procure his diſcharge, and for the defendant's pains. Not being proſecuted, he brought his action for the whole 70l. and, upon the trial, the queſtion was whether money given to a man to be expended in an ill uſe, might be recovered by the giver, who was *particeps criminis;* and it appearing that the money had been diſpoſed of in bribes, a verdict was given for the plaintiff: and Sir *B. Shower* cited a caſe where a bribe was given to a cuſtom-houſe officer, for exempting goods from payment of cuſtom, which being diſcovered, and the goods ſeized, the party recovered his money in *indebitatus aſſumpſit*. This, however, appears to be againſt the aſſertion of Lord *Hale*, at the cloſe of the caſe of *Tomkins* v. *Barnett*, *Skinner*, 412. His lordſhip's founding himſelf on the caſe he had mentioned, declared his opinion, that, in all caſes where money was paid for unlawful practices, the party, though *particeps criminis*, might recover at law; and that the reaſon was, that if the Courts of juſtice mean to prevent the perpetration of crimes, it muſt be not by allowing a man who has got poſſeſſion to remain in poſſeſſion, but by putting the parties back to the eſtate in which they were before. And he conſidered the rule as now clear; and mentioned a caſe of *Bromley* v. *Smith*, before Lord *Mansfield*, 1760, where a bribe was given to a creditor of a bankrupt, to induce him to ſign a certificate: he alſo mentioned, upon the point before him, a caſe of *Monteſiore*, 1762, from Mr. *Filmer*'s notes, in the hands of Mr. Attorney General (*Kenyon*) where, in order to procure a marriage, a brother of the intended huſband repreſented, that he was indebted to the intended huſband, on a partnerſhip account, and gave a note for 1730l. to be ſhewn to the parents of the wife,

wife, to induce them to enter into the contract; and the brother gave a bond of indemnity: no part of the money was ſettled on the marriage, and the note was their inducement to the marriage: there were afterwards many diſputes between the brothers, and at length they referred their diſpute to arbitration: the arbitrators thought that the note was given upon no conſideration, and diſallowed it in their account: the Court reverſed the award, on that ſingle ground, becauſe where one brother had given to the other the note for 1730l. to enable him to make a contract of marriage, he could not revoke it; it amounted to a contract to perform what he had done. His lordſhip was, upon theſe grounds, clear that Mr. *Neville* himſelf was entitled to relief: he had doubted before, on what had been ſaid by Lord *Mansfield*, that the father of a child, in ſuch a caſe, had an intereſt to ſee that the property of the huſband was ſuch as it had been repreſented to be, but he now thought clearly with him. He was of opinion that an injunction ſhould be awarded to reſtrain *Wilkinſon* from proceeding to recover any debt due before the marriage of Mr. *Neville* (except his bill for buſineſs, which the parties agreed to ſettle); and he declared his opinion that *Wilkinſon* could not ever recover that debt againſt Mr. *Neville*. *Neville and others* v. *Wilkinſon*, 1 *Brown's Reports*, 543. 1782.

MURDER.

Intereſting and Remarkable Caſes.

Jane Norkott, *the wife of* Arthur Norkott, *being murdered, the queſtion was, How ſhe came by her death?*

THE Coroner's inqueſt, on view of the body, and depoſitions of *Mary Norkott*, *John Okeman*, and *Agnes* his wife, were inclined to find *Jane Norkott* a *felo de ſe*, (a ſuicide); for they informed the Coroner and jury, "that ſhe was found dead in her bed; the knife ſticking in the floor, and her throat cut.—That the night before ſhe went to bed with

with her child, her husband being absent, and that no other person, after such time as she was gone to bed, came into the house, the examinants lying in the outer room, and they must needs have seen or known if any stranger had come in:" whereupon the jury gave up to the coroner a verdict that she was *felo de se*: but afterwards upon rumour amongst the neighbourhood, and their observation of divers circumstances, which manifested that she did not nor could possibly (according to those circumstances) murder herself; thereupon the jury, whose verdict was not yet drawn into form by the Coroner, assented, and desired the Coroner, that the body which was buried might be taken up out of the grave, which the Coroner assented unto; and thirty days after her death she was taken up, in the presence of the jury and a great number of people: whereupon the jury changed their verdict; and the persons being tried at *Hertford* assizes, were acquitted; but so much against the evidence, that Judge *Harvey* let fall his opinion, that it were better an appeal[a] were brought, than so foul a murder escape unpunished.

Accordingly the child of the deceased *Jane Norkott* brought an appeal against *John Norkott* his father, his grandmother, and aunt, and her husband *Okeman*; and because the evidence was so strange, says Sir *John Maynard*, I took exact and particular notice. And it was as follows:

After the matters above-mentioned had been related on the trial; an ancient and grave person, minister to the parish where the fact was committed, being sworn to give evidence, deposed, "That the body being taken up out of the grave, thirty days after the party's death, and lying on the grass, and the four defendants being present, were required each of them to touch the dead body. *Okeman*'s wife fell upon her knees, and prayed God to shew tokens of her innocency. The appellant did touch the dead body; whereupon the brow of the dead, which before was of a livid and carrion colour, (in *terminis*, the verbal expression of the witness) began to have a dew, or gentle sweat, arise on it, which increased by degrees till the sweat ran down in the drops on the face; the brow turned to a lively and fresh colour, and the deceased opened one of her eyes, and shut it again; and this opening the eye was

[a] Appeal in the sense wherein it is here used, denotes an accusation by a private subject against another, for some heinous crime; demanding punishment on account of the particular injury suffered, rather than for the offence against the public. See 4 *Black. Comm.* 412.

done three ſeveral times; ſhe likewiſe thruſt out the ring or marriage finger three times, and pulled it in again; and the finger dropped blood from it on the graſs." Sir *Nicholas Hyde*, Chief Juſtice, ſeeming to doubt the evidence, aſked the witneſs, Who ſaw this beſides you?

Witneſs. I cannot ſwear what others ſaw: but, my lord, (ſaid he) I do believe the whole company ſaw it; and if it had been thought a doubt, proof would have been made of it, and many would have atteſted with me. Then the witneſs, obſerving ſome admiration in the auditors, ſpake farther: "My Lord, I am miniſter of the pariſh, and have long known all the parties, but never had occaſion of diſpleaſure againſt any of them, nor had to do with them, or they with me; but, as I was miniſter, the thing was wonderful to me: but I have no intereſt in the matter, but as called upon to teſtify the truth, and that I have done." (This witneſs was a very reverend perſon, as I gueſſed, of about ſeventy years of age; his teſtimony was delivered gravely and temperately, but to the great admiration of the auditory.) Whereupon, applying himſelf to the Chief Juſtice, he ſaid, "My Lord, my brother here preſent is miniſter of the next pariſh adjacent, and I am ſure ſaw all done that I have affirmed:" therefore that perſon was alſo ſworn to give evidence, and did depoſe in every point—"the ſweating of the brow—the change of the colour—thrice opening the eye—and the thrice motion of the finger, and drawing it in again;" only the firſt witneſs added, that he himſelf dipped his finger in the blood, which came from the dead body, to examine it, and he ſwore he believed it was blood.

I conferred afterwards with Sir *Edward Powell*, barriſter at law, and others, who all concurred in the obſervation: and for myſelf, if I were upon oath, can depoſe, that theſe depoſitions (eſpecially the firſt witneſs) are truly reported in ſubſtance.

The other evidence given againſt the priſoners, viz. the grandmother of the plaintiff, and againſt *Okeman* and his wife, That they confeſſed they lay in the next room to the dead body that night; and that none came into the houſe till they found her dead the next morning; therefore if ſhe did not murder herſelf, they muſt be the murderers. To that end further proof was made,

1. That ſhe lay in a compoſed manner in her bed, the bedcloaths not at all diſturbed, and her child by her in bed.

2. Her throat cut from ear to ear, and her neck broke. So that if ſhe firſt cut her throat, ſhe could not poſſibly break her neck in the bed.

3. There was no blood in the bed, ſaving a tincture of blood on the bolſter whereon her head lay, but no ſubſtance of blood at all.

4. From the bed's head there was a ſtream of blood on the floor, which ran along until it ponded in the bendings of the floor, to a very great quantity; and there was alſo another ſtream of blood on the floor at the bed's foot, which ponded alſo on the floor to a very great quantity; but no continuance or communication of blood on either of thoſe two places, from one to the other, neither upon the bed, ſo that ſhe bled in two ſeveral places; and it was depoſed, turning up the matt of the bed, that there were clots of congealed blood in the ſtraw of the matt underneath.

5. The bloody knife was found in the morning ſticking in the floor, a good diſtance from the bed; but the point of the knife, as it ſtuck, was towards the bed, and the haft from the bed.

6. There was the print of a thumb and four fingers of a left hand.

Sir *Nicholas Hyde*, Chief Juſtice. How can you know the print of a left hand from the print of a right hand in ſuch a caſe?

Witneſs. My Lord, it is hard to deſcribe; but if it pleaſe that honourable judge to put his left hand upon your left hand, you cannot poſſibly place your right hand in the ſame poſture; which being done, and appearing ſo, the defendants had time to make their defence, but gave no evidence to any purpoſe.—The jury departed from the bar; and returning, acquitted *Okeman*, and found the other three guilty: who being ſeverally demanded why judgment ſhould not be pronounced, ſaid nothing but ſeverally, "I did not do it, I did not do it."—Judgment was given, and the grandmother and huſband executed; but the aunt had the privilege to be ſpared execution, being with child. I inquired if they confeſſed any thing at their execution, but they did not, as I was told. *State Trials*, Vol. X. Appendix, p. 29, A. D. 1641.

The Caſe of JOAN PERRY, *and her two Sons,* JOHN *and* RICHARD PERRY, *for the ſuppoſed Murder of* WILLIAM HARRISON, *Gent.*

WILLIAM HARRISON, ſteward to Lady *Campden*, at *Campden* in *Glouceſterſhire*, about ſeventy years of age, went *Auguſt* 16, 1660, to receive my lady's rents, which he did; and not returning home that night, gave cauſe to ſuſpect he was murdered. After ſome time, *John Perry*, his ſervant, gave information before a juſtice of peace, That his brother *Richard* had robbed and murdered him, and his mother ſtood by whilſt it was done; and that *Richard* had once before broke open his maſter's houſe, and robbed him.—At the following aſſizes, *Joan*, *John* and *Richard Perry* had two indictments preferred againſt them, one for breaking open the houſe of Mr. *Harriſon*, and robbing him of 140l. in the year 1659; and the other for robbing and murdering him, *Auguſt* 16, 1660. Upon the laſt indictment, the then judge of aſſize, Sir *Chriſtopher Turner*, Knt. would not try them, becauſe the body was not found: on the former indictment for the robbery, they pleaded Not Guilty; but on people's perſuading them, they retracted their plea, and pleaded Guilty; begging the benefit of his majeſty's moſt gracious pardon and act of oblivion, which was granted them: and though they pleaded guilty to this indictment, being prompted thereto, yet they all at their deaths denied it. Yet at this aſſize, *John Perry* perſiſted in his ſtory, That his mother and brother had murdered his maſter, and that they had attempted to poiſon him in gaol for diſcovering it, ſo that he durſt not eat or drink with them. And

At the next aſſizes following, *Joan*, *John* and *Richard Perry*, were, by the judge of aſſize, Sir *Robert Hyde*, Knt. tried upon the indictment of murder, and pleaded Not Guilty; when *John*'s confeſſion before the juſtice was proved *viva voce*, by ſeveral witneſſes who heard the ſame. He then told the Court, He was mad, and did not know what he had ſaid. The other two, *Richard* and *Joan Perry*, declared they were wholly innocent of what they were accuſed; that they knew nothing of Mr. *Harriſon*'s death, nor what was become of him; and *Richard* ſaid, his brother had accuſed others as well as him, to have murdered his maſter; which the judge bidding him prove, he ſaid, That moſt of them that had given evidence

againſt him, knew it: but naming no body, nor any body ſpeaking to it, the jury found them all guilty.

Some days after, being brought to the place of execution, which was on *Broadway-Hill* within ſight of *Campden*, the mother (being reputed a witch, and to have ſo bewitched her ſons, they could confeſs nothing while ſhe lived) was firſt executed: (ſtrange ignorance and ſuperſtition!) after which, *Richard*, being on the ladder, profeſſed, as he had done all along, That he was wholly innocent of the fact for which he was to die, and that he knew nothing of Mr. *Harriſon*'s death, nor what was become of him; and did, with great earneſtneſs, beg and beſeech his brother (for the ſatisfaction of the whole world and his own conſcience) to declare what he knew concerning it. But he, with a dogged and ſurly carriage, told the people, he was not obliged to confeſs to them; yet, immediately before his death, ſaid, "He knew nothing of his maſter's death, nor what was become of him," but they might hereafter poſſibly hear.——"It is ſtrange, that a judge would order the execution of three perſons, for the ſuppoſed murder of a man whoſe body was not found, or heard of at the time of trial, upon the confeſſion of a madman or an enthuſiaſt!"—However, Mr. *Harriſon*, ſome years after, appeared alive; and in a letter to Sir *Thomas Overbury*, of *Burton* in *Glouceſterſhire*, gave an account, how that very night, *Auguſt* 16, returning home, after receiving the rents, he was ſet upon, and forced by ſeveral ſtages to the ſea-ſide, put on board a ſhip, and carried into *Turkey*, where he was ſold for a ſlave to a phyſician, and continued with him for about a year and three quarters, when his maſter died; then he made the beſt of his way to a ſea-port, and with great difficulty got on board a *Hamburgh* ſhip bound for *Portugal*, and arrived ſafe at *Liſbon*; from whence, by the means of an *Engliſh* merchant, he got on board an *Engliſh* veſſel, and arrived ſafe at *Dover*, and from thence to his own home, to the ſurprize of all the country. This account was ſent with the following letter from Sir *Thomas Overbury* to Dr. *Shirley*, who publiſhed it;

"Sir,

"I Herewith ſend you a ſhort narrative of that no leſs ſtrange than unhappy buſineſs, which ſome years ſince happened in my neighbourhood: the truth of every particular whereof I am able to atteſt: and I think it may very well be reckoned among the moſt remarkable occurrences of this

this age. You may diſpoſe of it as you pleaſe; and in whatever I can ſerve you, you may freely command me, as

Your moſt affectionate kinſman and humble ſervant,

THOMAS OVERBURY."

Burton, Aug. 2, 1676.

Caſe of WILLIAM YORK,

AT *Bury* ſummer aſſizes, 1748, *William York*, a boy of ten years of age, was convicted before Lord Chief Juſtice *Willes* for the murder of a girl about five years of age, and received ſentence of death; but the Chief Juſtice, out of regard to the tender years of the priſoner, reſpited execution, till he ſhould have an opportunity of taking the opinion of the reſt of the judges, whether it was proper to execute him or not, upon the ſpecial circumſtances of the caſe; which he reported to the judges at *Serjeant's-Inn* in *Michaelmas* term following.

The boy and girl were pariſh children, put under the care of a pariſhioner; at whoſe houſe they were lodged and maintained: on the day the murder happened, the man of the houſe and his wife went out to their work early in the morning, and left the children in bed together; when they returned from work the girl was miſſing; and the boy being aſked what was become of her, anſwered, that he had helped her up and put on her cloaths, and that ſhe was gone he knew not whither: upon this, ſtrict ſearch was made in the ditches and pools of water near the houſe, from an apprehenſion that the child might have fallen into the water. During this ſearch, the man, under whoſe care the children were, obſerved that a heap of dung near the houſe had been newly turned up; and upon removing the upper part of the heap, he found the body of the child about a foot's depth under the ſurface, cut and mangled in a moſt barbarous and horrid manner.

Upon this diſcovery, the boy, who was the only perſon capable of committing the fact, that was left at home with the child, was charged with the fact, which he ſtiffly denied.

When the Coroner's jury met, the boy was again charged, but perſiſted ſtill to deny the fact. At length, being cloſely interrogated, he fell to crying, and ſaid he would tell the whole truth. He then ſaid that the child had been uſed to foul herſelf in bed; that ſhe did ſo that morning (which

(which was not true, for the bed was ſearched and found to be clean); that thereupon he took her out of the bed, and carried her to the dung-heap; and with a large knife, which he found about the houſe, cut her in the manner the body appeared to be mangled, and buried her in the dung-heap; placing the dung and ſtraw that was bloody under the body, and covering it up with what was clean; and having ſo done, he got water and waſhed himſelf as clean as he could.

The boy was the next morning carried before a neighbouring juſtice of the peace, before whom he repeated his confeſſion, with all the circumſtances he had related to the Coroner and his jury. The juſtice of the peace very prudently deferred proceeding to a commitment, until the boy ſhould have an opportunity of recollecting himſelf. Accordingly he warned him of the danger he was in if he ſhould be thought guilty of the fact he ſtood charged with, and admoniſhed him not to wrong himſelf: and then ordered him into a room, where none of the crowd that attended ſhould have acceſs to him.

When the boy had been ſome hours in this room, where victuals and drink were provided for him, he was brought a ſecond time before the juſtice, and then he repeated his former confeſſion: upon which he was committed to gaol.

On the trial, evidence was given of the declarations before-mentioned to have been made before the Coroner and his jury, and before the juſtice of the peace; and of many declarations to the ſame purpoſe which the boy made to other people after he came to gaol, and even down to the day of his trial; for he conſtantly told the ſame ſtory in ſubſtance, commonly adding that the devil put him upon committing the fact. Upon this evidence, with ſome other circumſtances tending to corroborate the confeſſions, he was convicted.

Upon this report of the Chief Juſtice, the judges, having taken time to conſider of it unanimouſly agreed,

1. That the declarations ſtated in the report were evidence proper to be left to the jury.

2. That ſuppoſing the boy to have been guilty of this fact, there are ſo many circumſtances ſtated in the report, which are undoubtedly tokens of what my Lord Chief Juſtice *Hale* ſomewhere calleth a *miſchievous diſcretion*, that he is certainly a proper ſubject for capital puniſhment, and ought to ſuffer; for it would be of very dangerous conſequence to have it thought, that children may commit ſuch atrocious crimes with impunity.

There

There are many crimes of the moſt heinous nature, ſuch as in the preſent caſe; the murder of young children, poiſoning parents or maſters, burning houſes, &c. which children are very capable of committing; and which they may in ſome circumſtances be under ſtrong temptations to commit; therefore, though the taking away the life of a boy of ten years old may ſavour of cruelty, yet as the example of this boy's puniſhment may be a means of deterring other children from the like offences; and as the ſparing this boy, merely on account of his age, will probably have a quite contrary tendency, in juſtice to the public, the law ought to take its courſe; unleſs there remaineth any doubt touching his guilt.

In this general principle all the judges concurred: but two or three of them, out of great tenderneſs and caution, adviſed the Chief Juſtice to ſend another reprieve for the priſoner; ſuggeſting that it might poſſibly appear on farther inquiry, that the boy had taken this matter upon himſelf at the inſtigation of ſome perſon or other, who hoped by this artifice to ſcreen the real offender from juſtice.

Accordingly the Chief Juſtice did grant one or two more reprieves; and deſired the juſtice of the peace who took the boy's examination, and ſome other perſons in whoſe prudence he could confide, to make the ſtricteſt inquiry they could into the affair, and report to him. At length he, receiving no farther light, determined to ſend no more reprieves, and to leave the priſoner to the juſtice of the law at the expiration of the laſt; but before the expiration of that reprieve, execution was reſpited till farther order, by warrant from one of the Secretaries of State: and at the ſummer aſſizes, 1757, he had the benefit of his Majeſty's pardon, upon conſideration of his entering immediately into the ſea-ſervice. *Foſter's Crown Caſes*, 70. 1748.

Caſe of RICHARD MASON.

RICHARD MASON was indicted for the wilful murder of *William Maſon* his brother; and was upon full evidence convicted to the ſatisfaction of the Court, and judgment of death was paſſed on him. But the judge being informed that ſome gentlemen of rank at the bar doubted, whether upon the circumſtances given in evidence the offence amounted to murder or manſlaughter; he reſpited execution till the opinion of the judges could be taken

upon the caſe, which he reported to have been as followeth:

The priſoner, with the deceaſed and another brother and ſome neighbours, was drinking in a friendly manner at a public-houſe; till growing warm in liquor but not intoxicated, the priſoner and the deceaſed began in idle ſport to pull and puſh each other about the room. They then wreſtled one fall, and ſoon afterwards played at cudgels by agreement. All this time no tokens of anger appeared on either ſide, till the priſoner in the cudgel-play gave the deceaſed a ſmart blow on the temple. The deceaſed thereupon grew angry, and throwing away his cudgel cloſed in with the priſoner, and they fought a ſhort ſpace in good earneſt: but the company interpoſing they were ſoon parted.

The priſoner then quitted the room in anger; and when he got into the ſtreet was heard to ſay, "Damnation ſeize me, if I do not fetch ſomething and ſtick him." And being reproved for uſing ſuch expreſſions, he anſwered, "I'll be damned to all eternity, if I do not fetch ſomething and run him through the body."

The deceaſed and the reſt of the company continued in the room where the affray happened; and in about half an hour the priſoner returned, having put off a ſlight thin coat he had on when he quitted the room, and put on one of a coarſe thick cloth. The door of the room being open into the ſtreet, the priſoner ſtood leaning againſt the door-poſt, his left-hand in his boſom and his cudgel in his right, looking in upon the company, but not ſpeaking a word.

The deceaſed ſeeing him in that poſture invited him into the company: but the priſoner anſwered, "I will not come in." "Why will you not?" ſaid the deceaſed. The priſoner replied, "Perhaps you will fall on me and beat me." The deceaſed aſſured him he would not; and added, "Beſides you think yourſelf as good a man as me at cudgels, perhaps you will play at cudgels with me." The priſoner anſwered, "I am not afraid to do ſo if you will keep off your fiſts."

Upon theſe words the deceaſed got up and went towards the priſoner, who dropped the cudgel as the deceaſed was coming up to him. The deceaſed took up the cudgel and with it gave the priſoner two blows on the ſhoulder. The priſoner immediately put his right-hand into his boſom, and drew out the blade of a tuck-ſword crying, "Damn you, ſtand off, or I'll ſtab you;" and immediately, without giving

giving the deceaſed time to ſtep back, made a paſs at him with the ſword, but miſſed him. The deceaſed thereupon gave back a little, and the priſoner ſhortening the ſword in his hand, leaped forward toward the deceaſed, and ſtabbed him to the heart, and he inſtantly died.

The judges having had copies of the caſes left at their chambers, met in *Michaelmas* vacation at Lord *Mansfield's* chambers, and unanimouſly agreed, that there are in this caſe ſo many circumſtances of deliberate malice and deep revenge on the priſoner's part, that his offence cannot be leſs than wilful murder. He vowed he would fetch ſomething to ſtick *him*, to run *him* through the body. Whom did he mean by *him?* Every circumſtance in the caſe ſheweth he meant his brother: he returned to the company provided to appearance with an ordinary cudgel, as if he intended to try ſkill and manhood a ſecond time with that weapon; but the deadly weapon was all the while carefully concealed under his coat; which moſt probably he had changed for the purpoſe of concealing the weapon.

He ſtood at the door refuſing to come nearer; but artfully drew on the diſcourſe of the paſt quarrel; and as ſoon as he ſaw his brother diſpoſed to engage a ſecond time at cudgels, he dropped his cudgel and betook him to the deadly weapon, which till that moment he had concealed.

He did indeed bid his brother ſtand off; but he gave him no opportunity of doing ſo before the firſt paſs was made. His brother retreated before the ſecond, but he advanced as faſt, and took the revenge he had vowed.

The circumſtance of the blows before the ſword was produced, which I preſume might weigh with the gentlemen who doubted, altereth not the caſe at all, nor doth the precedent quarrel; becauſe, all circumſtances conſidered, he appeareth to have returned with a deliberate reſolution to take a deadly revenge for what had paſſed; and the blows were plainly a provocation ſought on his part, that he might execute the wicked purpoſe of his heart, with ſome colour of excuſe.

He was ſoon afterwards executed. *Foſter's Crown Caſes*, 70. 1756.

The Caſe of REASON *and* TRANTER.

REASON and TRANTER were indicted for the murder of Mr. *Lutterell*. The facts were theſe: theſe men were officers of the ſheriff of *Middleſex*, and had a warrant to arreſt

arreſt Mr. *Lutterell* for 10l. They arreſted him coming out of his lodgings, whereupon he deſired them to go back with him to his lodgings, and he would pay the money. They complied with this, and *Reaſon* went up with him into the dining-room, having ſent *Tranter* to the attorney's for a bill of the charges, whilſt *Reaſon* and the deceaſed continued together, ſome words paſſed between them in relation to civility-money, which Mr. *Lutterell* refuſed to give, and thereupon went up another pair of ſtairs to order his lady to tell out the money, and then returned to *Reaſon* with two piſtols in his breaſt, which upon the importunity of the maid he laid down upon the table, and retired to the fire wnich was at the other end of the room, declaring he did not deſign to hurt the defendants, but he would not be ill uſed.

By this time *Tranter* returned from the attorney's with the bill, and being let in by the boy went directly up ſtairs to his partner, being followed by the boy, who ſwore, that as he was upon the ſtairs (*Tranter* being that minute gone into the dining-room) he heard a blow given, but could not tell by whom, and thereupon haſtening into the room he found *Tranter* had run the deceaſed up againſt the cloſet door, and *Reaſon* with his ſword ſtabbing him. Mr. *Lutterell* ſoon ſunk down upon the floor, and begged for mercy; but *Reaſon* ſtanding over him continued to ſtab him, till he had wounded him in nine places.

By this time the maid came in, and ſeeing her maſter in that poſture, ſhe and the boy ran out for help, and immediately heard one of the piſtols go off, and preſently after the ſecond, which a woman, looking out at a window on the other ſide the way, proved to be fired by *Reaſon*, and ſeveral people, upon the alarm of the maid, coming into the room, found Mr. *Lutterell* upon the floor where the maid left him, without any ſword or piſtol near him.

On behalf of the priſoners evidence was given that Mr. *Lutterell* had a walking-cane in his hand, and that *Tranter* had a ſcratch in his forehead, which might be probably a blow with the cane, and the blow heard by the boy upon *Tranter*'s firſt going into the room. And one of the ſurgeons depoſed, that the deceaſed had made ſuch declarations to the clergyman, but this witneſs afterwards being alone with Mr. *Lutterell* preſſed him very earneſtly to diſcover the truth, upon which Mr. *Lutterell* did ſay, that he believed he might ſtrike one of them with his cane before they run him through.

Upon

Upon this the queſtion aroſe whether Mr. *Lutterell*'s ſtriking one of the bailiffs firſt would reduce the ſubſequent killing to be manſlaughter only?

In ſupport of the proſecution it was argued that notwithſtanding ſuch ſtroke the priſoner would be guilty of murder, that not being a ſufficient provocation for giving the death's wound with the piſtol: and for this *Holloway*'s caſe, *Cro. Car.* 139, and *Kelyng* 127, were cited, where the woodward, finding a boy in the park who came to ſteal wood, tied him to a horſe's tail in order to correct him, the horſe ran away and the boy was killed: and this was adjudged to be murder, becauſe the tying him to the horſe's tail, being an act of cruelty, for which no ſufficient provocation had been given, he was anſwerable for all the conſequences of it.

On behalf of the priſoner it was inſiſted that the bringing down the piſtol was a ſufficient alarm to them to be upon their guard, and then when he ſtruck one of them, it was reaſonable for them to apprehend themſelves to be in danger; and in ſuch caſe a prudent man would not leave it any longer in the power of his adverſary to do him any further miſchief.

To this it was anſwered, that if Mr. *Lutterell* had continued to keep the piſtols in his boſom, there might be ſome colour for an apprehenſion of danger; but the contrary appearing, viz. that he was at a diſtance from the piſtols, with the defendants between him and them; they had no ground to fear any harm upon that account; and the death's wound was given after Mr. *Lutterell* was fallen down with the wounds he had received with the ſword, and was intirely in the power of the priſoner; ſo that what they did afterwards was murder in them, becauſe it exceeded the bounds of ſelf-preſervation.

The Court in directing the jury ſaid, that if they believed Mr. *Lutterell* made the firſt aſſault upon the bailiffs, the killing with the piſtol after he was down would be but manſlaughter; and the jury upon that direction found them guilty of manſlaughter only, though otherwiſe they were diſpoſed to have hanged them for the barbarity of the act.

They were burnt in the hand. *Reaſon* and *Tranter*, *King's-Bench*, 1 *Strange's Reports*, 499. 1721.

The Caſe of JOHN HUGGINS.

THE priſoner *John Huggins* was indicted for the murder of *Edward Arne*, a priſoner in the *Fleet* priſon. It appeared that *Huggins* was warden of the *Fleet*; and that one *Thomas Gibbon* was his deputy. *Gibbon* had a ſervant, viz. *James Barnes*, who acted in the care of priſoners, and among others of the deceaſed *Edward Arne*. On the 7th of *September*, *Barnes* placed *Arne* in a new-built room in the priſon, where he kept him ſix weeks without fire, chamber-pot or cloſe-ſtool, the walls being damp and unwholeſome, and the room built over the common ſewer: all which was within *Barnes*'s knowledge.

On the 10th of *September*, *Arne* became ſick, and languiſhed till the 20th of *October* following, when he died in this room. It appeared further in evidence before the jury, that for at leaſt fifteen days before *Arne*'s deceaſe, *Huggins*, the priſoner, knew the condition of the room and was once preſent at the priſon, and ſaw *Arne* in this ſituation, but he turned away, and *Barnes* ſhut the door, and *Arne* continued in the room until he died. It further appeared that while *Gibbon* was deputy, *Huggins* himſelf ſometimes acted as warden.

The jury were in doubt about their verdict, whether this was murder in *Huggins*, who *only* was taken and put on his trial: on theſe facts, found in a ſpecial verdict, the queſtion was left for the Court.

The queſtion was argued in the Court of King's-Bench by Mr. *Willes* and Serjeant *Eyre*; after which it was argued at Serjeant's-Inn Hall, before all the judges, by Serjeant *Cheſhyre*, the Attorney and Solicitor General and Mr. *Willes* for the proſecution, and by Serjeant *Darnall*, Serjeant *Eyre*, Serjeant *Hawkins*, *Peere Williams*, *Strange* and *Forſter*, for the priſoner. After which

Lord Chief Juſtice *Raymond* delivered the opinion of the Court as follows:

The queſtion is, Whether upon the facts (as before ſtated), the priſoner *Huggins* is guilty of the murder of *Edward Arne?*

For that purpoſe it will be neceſſary to conſider theſe two things: 1. What offence it is in *James Barnes?* and 2. Whether the priſoner is guilty in the ſame degree?

And as to the firſt point we are all of opinion, that if *Barnes* was now before the Court, and the facts as found in this verdict were found againſt him, he would undoubtedly

doubtedly be guilty of murder. It is certain there is no particular way of killing another, that is neceſſary to conſtitute a murder; but the committing of murder is as various as the ſeveral ways of putting an end to life. In the caſe of a priſoner there is no occaſion for an actual ſtroke: the reſtraining him by force and killing him by ill uſage, is enough to conſtitute this offence. All the authors who ſpeak of this ſpecies of murder deſcribe it by a general expreſſion, *per dure garde de ſes gardens.* The duty of a gaoler is not to puniſh, but confine the party, for the ſingle purpoſe of his being forth-coming to anſwer a legal charge or demand. *Fleta* 38. In this caſe *Barnes* has certainly exceeded his duty: he has been guilty of a breach of that truſt which the law has repoſed in him, and is anſwerable for all the conſequences of it.

Another conſideration to make it murder is, that it is a deliberate act, of long continuance, and of great cruelty. It is likewiſe accompanied with force, againſt the conſent of the party. On all which accounts the law implies malice. Had he therefore been before the Court, there would have been no difficulty in adjudging it murder with regard to him.

Secondly, Having thus determined what offence it would be in *Barnes*, let us now conſider how it ſtands with regard to the priſoner at the bar. And though the indictment has charged him equally with the other, yet we think the verdict has made a wide difference between them. The indictment charges *Barnes* to be his ſervant, but the verdict finds he was the ſervant of *Gibbon*. The whole charge in the verdict againſt the priſoner is, that for fifteen days before *Arne*'s death, he knew what ſort of a room he was in: that he once ſaw him under the dureſs of impriſonment: that *Barnes* had put him in: and that during the time *Gibbon* was deputy, *Huggins* ſometimes acted as warden. But notwithſtanding theſe circumſtances which are found againſt the priſoner at the bar, we are all of opinion, he is not guilty of murder.

It is a point not to be diſputed, but that in criminal caſes the principal is not anſwerable for the act of the deputy, as he is in civil caſes: they muſt each anſwer for their own acts, and ſtand or fall by their own behaviour. All the authors that treat of criminal proceedings, proceed on the foundation of this diſtinction; that to affect the ſuperior by the act of the deputy, there muſt be the command of the ſuperior, which is not found in this caſe.

The

The dureſs in this caſe conſiſted in the firſt taking him againſt his conſent, and putting him in that room, and the keeping him there ſo long without neceſſaries, which was the occaſion of his death. Now none of theſe circumſtances are found againſt the priſoner. The jury does not ſay he directed his being put into the room, that he knew how long he had been there, that he was without the neceſſaries in the indictment, or was ever kept there after the time the priſoner ſaw him, which was fifteen days before his death. And as theſe circumſtances are found againſt *Barnes*, and not againſt *Huggins*; and as in theſe caſes the Court is never to intend any thing, but muſt found their judgment on the facts as ſtated in the ſpecial verdict, and on them only; there can be no colour to think one equally guilty with the other. The only circumſtance relied upon to ſupply all this is, the priſoner's being once at the priſon where he ſaw the deceaſed under the dureſs, and turned away. But ſurely the bare being preſent can never amount to an aiding and abetting. He ſaw him there, it is true; but does that infer he know how it was occaſioned, or conſented to the continuance of it? It is very material in this caſe that the dureſs by which this unfortunate man came to his end, could not be known by a bare looking in upon him: he could not know he was there againſt his conſent, he could not by ſeeing him know the length of his confinement, or how long he had been without the decent neceſſaries of life: and it is likewiſe material, that no application is found to have been made to *Huggins* the priſoner, which perhaps might have altered the caſe.

Theſe circumſtances, taking them all together, are a very ſlender evidence of a conſent in the priſoner to the dureſs: though this I muſt ſay, that were they ever ſo ſtrong an evidence of conſent; they will not be ſufficient for us to ground a judgment upon: we are to determine upon facts, and not on evidence of facts; ſo is *Kelyng* 78, 111. where it is found, that *Plummer* diſcharged the fuzee, but not that he diſcharged it againſt the king's officers; and the Court could not take it that he did. It would be the moſt dangerous thing in the world, if we ſhould once give into the doctrine of inferring facts from evidence; which is the proper buſineſs of a jury, and not of the Court.

But it is objected, that though the priſoner had made a deputy, he had ſtill the inſpection of the gaol; and for the time he was there, the power of the deputy ceaſed. To this I anſwer, that there is no caſe in law which proves, that

that the accidental preſence of the principal amounts to a revocation; and in reaſon it ought to be conſtrued ſuch a coming, as ſhews he intended to take upon himſelf the execution of the office. If a diſſeiſee comes to dine with the diſſeiſor, that will not amount to an entry.

It is likewiſe inſiſted on that in many caſes a perſon who is abſent when the murder is committed, may nevertheleſs be an aider and abetter; and the caſes were put of laying poiſon, putting a child in a hogſtye, covering it with leaves, or leaving a ſick man in the cold, by which he dies, which are all to be met with in *Kelyng*. Now as to theſe caſes, I muſt obſerve that in one of them the perſon abſent did the act which was the occaſion of death; whereas here the act is found to have been done by another.

It was further obſerved upon this head of abſence, that in *Staunf.* 17. *Cromp.* 24. 6. the caſe is ruled to be murder, of letting a miſchievous beaſt go abroad, which happens to kill a man. But ſurely that is laid down too general in thoſe books: and it would be very hard, if a man takes a reaſonable care to keep up the beaſt, that he ſhould be anſwerable, if the beaſt ſhould break out without his knowledge or conſent.

There is but one thing more that was preſſed by the king's counſel, viz. that ſince it was determined in *Oneby*'s caſe that it is not neceſſary for the jury to find malice, why is it more neceſſary to find the priſoner's conſent? To this I anſwer, that malice is matter of law ariſing from a legal conſtruction of the act; and from the act of the party the law has always conſtrued, whether there was malice expreſs or implied: but conſent is an act of the mind: a ſudden killing is conſtrued to be malicious, though there is no time for any conſent. Theſe are the reaſons which induce us to determine that upon this verdict the priſoner at the bar is not guilty of the murder of *Edward Arne*. *King's-Bench* 2. *Strange's Reports*, 882. 1726.

The Caſe of JOHN ONEBY.

JOHN ONEBY was indicted for the murder of *William Gower;* the circumſtances attending which were as follow:

Upon the 2d of *February* 1725, the priſoner *Oneby* and *Gower* the deceaſed, were in company, together with *John Rich*, *Thomas Hawkins* and *Michael Blount*, in a room at the *Caſtle Tavern* in the county of *Middleſex*, in a friendly manner. After they had continued thus for two hours, box and dice were called for; the drawer ſaid, he had dice but no

no box, and thereupon *Oneby* bid the drawer bring the pepper-box, which he immediately did; and then the company began to play at hazard, and after they had played ſome time, *Rich* aſked if any one would ſet him three half crowns? whereupon *Gower* the deceaſed in a jocular manner, laid down three halfpenny pieces, and then ſaid to *Rich*, I have ſet you three pieces; and *Oneby* the priſoner at the ſame time ſet the ſaid *Rich* three half crowns, which *Rich* won: and immediately after, *Oneby*, in an angry manner, turned about to the deceaſed, and ſaid it was an impertinent thing to ſet halfpence, and that *Gower* was an impertinent puppy for ſo doing; to which *Gower* anſwered, whoever called him ſo was a raſcal. *Oneby* thereupon took up a bottle and with great force threw it at *Gower*; it did not hit him, but bruſhed his perriwig as it paſſed by his head, and beat out ſome of the powder: whereupon *Gower* immediately toſſed a candleſtick or bottle at *Oneby*, but did not hit him: upon which *Gower* and *Oneby* both roſe up to fetch their ſwords, which then hung up in the room, and *Gower* drew his ſword, but *Oneby* was prevented from drawing his by the company; *Gower* thereupon threw away his ſword, and the company interpoſing, they ſat down again for the ſpace of an hour. At the expiration of an hour, *Gower* ſaid to *Oneby*, "We have had hot words, but you was the aggreſſor, but I think we may paſs it over;" and at the ſame time offered his hand: to which *Oneby* anſwered, "No, damn you, I will have your blood." Afterwards the reckoning was paid, and all the company except *Oneby*, went out of the room to go home; and he remaining alone in the room, called to *Gower* in theſe words, "Young man, come back, I have ſomething to ſay to you;" whereupon *Gower* returned into the room, and immediately the door was flung to and ſhut, and thereby the reſt of the company were excluded; and then a claſhing of ſwords was heard, and *Oneby* with his ſword gave *Gower* a mortal wound, of which he died the next day. It was given in evidence that at the breaking up of the company the priſoner *Oneby* had his great coat thrown over his ſhoulders, and that he received three ſlight wounds in the engagement; and that *Gower* being aſked upon his deathbed, whether he received his wound in a manner which amongſt ſwordmen is called fair, anſwered, "I think I did," and from the time of throwing the bottle there was no reconciliation between the priſoner and the deceaſed. The queſtion upon theſe facts which were found by the jury was, Whether this be murder or manſlaughter?

Serjeant *Darnall* againſt the priſoner argued, that it was murder, as follows: In order to conſider whether this be murder or manſlaughter, I ſhall premiſe that which is not to be diſputed, that every malicious killing is murder, and that malice may be either expreſs or implied. This is malice implied in the act itſelf, becauſe there was no reaſonable provocation; there was nothing but words paſſed between them, till the priſoner threw the bottle at the deceaſed; and it has been often reſolved, that in point of law words are no provocation. But if words were a ſufficient provocation, yet it appears the priſoner began with words as well as acts. The calling Mr. *Gower* an impertinent puppy, was previous to the ſaying or doing of any thing by Mr. *Gower* that could give offence to the priſoner: if the ſetting of halfpence was a thing to be reſented, the affront was to Mr. *Rich*, and not to Mr. *Oneby*, whoſe bet to *Rich* was not at all affected by what was done by Mr. *Gower*. And that it is murder in this defendant I think cannot be diſputed after the judgment of the Court in *Mawgridge*'s caſe, *Kelyng* 119. There the bottle thrown by *Cope* hit *Mawgridge* and broke his head: here the candleſtick or bottle toſſed by *Gower* did not hit the priſoner at the bar: that was a ſudden conflict, this a deliberate act, after a diſpoſition to peace manifeſted by *Gower*, and a continuance of malice in the priſoner for above an hour after the firſt conflict. What was done here by Mr. *Gower* would have been juſtifiable in him, even if the candleſtick had hit the priſoner; and ſo it was reſolved in *Mawgridge*'s caſe, for there the bottle returned by Mr. *Cope* hit the defendant and broke his head. And as the act done by Mr. *Gower* was juſtifiable in him; it follows that it can be no foundation to excuſe or mitigate the ſubſequent killing by Mr. *Oneby*. The caſe put in *Kelyng* 128. of an aſſault by A. upon B. B. draws his ſword and purſues A. to the wall, where A. in his own defence kills B. and it is held murder in A. has many ſtrong circumſtances in favour of A. which are not in this caſe.

But I apprehend, it is not neceſſary to rely barely on this point; that there is malice implied in the act; ſince it plainly appears upon the ſtate of the caſe, that here is expreſs malice: when the deceaſed was deſirous to end the matter amicably, the priſoner replies, "No, damn you, I will have your blood:" this explains and goes through the whole fact, and proves the ſubſequent killing to be malicious.

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I do therefore inſiſt that taking it either way, either as a killing out of malice implied, or malice expreſs, it is murder; and that this upon the fact is a killing of malice implied, and upon the priſoner's own words coupled with the fact, it is malice expreſs, and conſequently murder.

Serjeant *Eyre*, argued for the priſoner. The queſtion is, What degree of homicide this is? and I apprehend it to be but manſlaughter: the diſtinction is, that if the killing be of malice forethought, it is murder; if on a ſudden occaſion, this is but manſlaughter; and that I take to be this caſe.

In 3 *Inſt.* 51. malice prepenſed is defined to be, when one compaſſeth to kill another, and doth it *ſedato animo:* on the other hand, manſlaughter is the doing it without premeditation upon a ſudden brawl, ſhuffling or contention. 3 *Inſt.* 57.

The law has ever been indulgent to the paſſions of men: *ira furor brevis eſt*, and therefore as a madman the party is excuſed for what he does in a ſudden tranſport of paſſion: I do admit, that bare words are no provocation; but yet they will ſerve to explain the nature of the combat, and ſhew whether it was ſudden or not. The calling the priſoner a raſcal, was what no man of honour could put up with; and as this was the beginning of the quarrel, the fighting was as ſudden as the reproachful words. If the priſoner had ſtabbed Mr. *Gower* upon ſpeaking the words, and *Gower* had done nothing, I believe it would have been murder; but here was a regular fight, and interchange of blows, and ſo it comes up to the caſe put in *Kelyng* 55, of a combat between two of a ſudden heat, where if one kills the other, it is but manſlaughter.

The law has fixed no certain time when it ſhall be preſumed the paſſions of men are cooled. The caſe in 12 *Co.* 87. muſt take up a longer time than this, for there the boy who had been beaten by another in a combat ran three quarters of a mile to his father, and told his ſtory, and after that the father provided himſelf with a cudgel and had as far to go in purſuit of the other boy and gave him a blow of which he died; this was not murder: and there is this difference between that caſe and the caſe at bar; that there the adverſary was out of ſight, but here he continued in preſence, which muſt rather inflame than abate the paſſion.

The words made uſe of by Mr. *Gower* carry an imputation on Mr. *Oneby*, which might provoke him afreſh: the telling him he was the aggreſſor was not likely to make an end of the quarrel; and that is plain from the manner in which Mr. *Oneby* underſtood them, who would never have

ſaid ſo harſh a thing to his friend Mr. *Gower*, if he had been at that time in any degree maſter of himſelf.

It does not appear who began, after Mr. *Gower* returned into the room. It is not likely the priſoner began, becauſe he had his great coat thrown over his ſhoulders; and as to the ſhutting the door, it is ſtated to be done immediately on *Gower*'s returning, and is likelier to be done by him that came into the room when the firſt conflict happened. It appears Mr. *Gower* was the readieſt to draw his ſword, it was actually drawn, and the priſoner's was not; and ſince it is not ſtated who drew firſt the ſecond time, I think it ought to be explained by the firſt.

To make it murder in the firſt inſtance, it muſt be done with a weapon that could endanger life: the bottle in *Mawgridge*'s caſe was full of wine, and it hit him ſo violently that he never ſpake more: but for any thing appearing upon the verdict, this might be only a ſmall oil bottle uſually ſet upon tables in public houſes, and might perhaps be empty before it was flung. The caſe of Mr. *Turner*, which is taken notice of in *Cumb.* 407, was held manſlaughter upon this reaſon, becauſe the clog was not ſuch an inſtrument, from a blow with which it was likely death ſhould enſue. But ſuppoſing the bottle to be as big and as full as *Mawgridge*'s bottle, yet no harm was done by it here, as there was in *Mawgridge*'s caſe. Here was no drawing the ſword *eo inſtante*, as *Mawgridge* did, which occaſioned the judges to lay the returning the bottle by Mr. *Cope* out of the caſe, and conſtrue the immediate drawing the ſword, as an intent to ſupply the miſchief the bottle might fall ſhort of. *Mawgridge*'s caſe is materially different from this. There the intention from the firſt throwing the bottle was to commit murder, here it was otherwiſe. There the firſt bottle hit, here it miſſed. There the murderous intent was immediately carried into execution, here was a long interruption. The deceaſed needed not have returned, if he had not been equally diſpoſed to combat; and he himſelf ſaid it was a fair combat, which there was no pretence to ſay in *Mawgridge*'s caſe.

Serjeant *Darnall* replied, The words on both ſides muſt certainly be laid out of the caſe; if not, *puppy* was worſe than *raſcal*, becauſe it is the name of a beaſt. If Mr. *Gower* took *Oneby* to be the aggreſſor, the condeſcenſion was the greater in him; it is no more than ſaying, I who have been injured am ready to paſs it by. I do not find it was at all relied upon in *Mawgridge*'s caſe, that the bottle was full: and as to the caſe in *Cumberbach*, the ſervant there had

had committed a fault, for which he was liable to be corrected: the deceaſed's declaration was only that he received the wound with a fair puſh.

The Court ſaid nothing upon this argument, but appointed another to be before the twelve judges of *England*. And in Eaſter term following it was accordingly argued by Mr. *Lee* for the proſecution and Mr. *Ketelbey* for the priſoner to the ſame effect as the former argument.

On the 12th of *June* following, the priſoner being brought to the King's-Bench bar, Lord Chief Juſtice *Raymond* delivered the reſolution of the Court as follows:

There has been a great deal of time ſince the trial of the priſoner, but that has not been ſpent on account of any difficulty in the caſe, but by the parties themſelves, in drawing up and ſettling the ſpecial verdict: it did not come before us till *Hilary* term laſt, ſince which we have heard two arguments, and are now ready to deliver our opinions. And I do now deliver it as the unanimous opinion of all the twelve judges, that the priſoner at the bar is guilty of murder.

The notion of murder is agreed on all hands to be, the killing another of malice prepenſe, that is in other words, a killing with a wicked deſign. The malice neceſſary to make the act murder, may be either expreſs or implied; and my Lord *Hale* in his *Pleas of the Crown*, when he is deſcribing what is malice implied, lays a great ſtreſs upon the manner of doing the act; and therefore puts the caſe of a man exerciſing an unruly horſe amongſt a multitude, where from the circumſtances of the act it is highly probable miſchief may enſue.

If a man kills another without any provocation, this is malice implied; for the law ſuppoſes there muſt be ſome latent malice in the party, or otherwiſe he would not be ſo barbarous as to take away the life of another. It may be murder, though words or even blows paſs between them; and the caſe put in *Kelyng* and cited at the bar, is certainly law; that if A. ſtrikes B. B. draws and returns the aſſault, and A. kills B. it is murder, though A. was upon his defence, and though the killing was ever ſo ſudden; and upon this principle it was, that *Mawgridge*'s caſe was adjudged.

It was ſaid, that *Mawgridge*'s caſe was a ſingle caſe, and went farther than any caſe before it, but I take this opportunity to declare, that we are all of opinion that *Mawgridge*'s caſe is law.

But

But as that caſe was adjudged murder upon the implied malice, we are all of opinion the caſe at bar goes farther; and that the priſoner is guilty of murder on expreſs malice.

A general malice againſt any man is expreſs malice with regard to that man. *Mod.* 86. If one man ſays he will revenge himſelf of another, or (as in this caſe) that he will have his blood, and a killing enſues; it is murder. Here is expreſs malice before the giving the wound. There was nothing done by the deceaſed but what was perfectly innocent: he ſet the halfpence to *Rich*, and not to the defendant; *Rich* did not reſent it, becauſe it was not done with a deſign to affront him, but in a jocular way, and could be no foundation for the priſoner to turn about in an angry manner and abuſe him. The words returned by Mr. *Gower* were not unſuitable to the occaſion; though if they had been ever ſo improper, it is certain they would have been no provocation in law. And as to their being looked upon otherwiſe amongſt thoſe who eſteem themſelves your men of honour, give me leave to ſay, thoſe are miſtaken notions of honour, nothing being conſiſtent with honour that is inconſiſtent with the laws of God or man.

The next thing that followed after the words, was the throwing the bottle at Mr. *Gower* with great violence. The bottle it is true only touched his perriwig; but ſuppoſe it had killed him, will any man offer to ſay it would not have been murder? What Mr. *Gower* did is not ſtated to be ſuch an act of violence as the priſoner's, which is found to be done with great force.

It was ſaid, that Mr. *Gower* was the firſt that drew his ſword, but with what intent appears very plainly: it was not to attack Mr. *Oneby*, but to defend himſelf; and therefore when he ſaw *Oneby*'s ſword ſecured, he immediately threw away his own.

After this they ſit down again and Mr. *Gower*, like a man of temper, applies to the other in a very proper manner: it was objected, that he thereby made Mr. *Oneby* to be the aggreſſor: if he did ſo, he ſaid no more than the truth, for *Oneby* began firſt both by abuſive language and by throwing of the bottle. And it is plain that Mr. *Gower* did not deſign to upbraid Mr. *Oneby*, but only uſed it as an argument to make up the matter.

The anſwer that is made to this is the ſtrongeſt evidence of expreſs malice. It can admit of no other conſtruction, but that he was determined to take away the other's life.

The calling him back after he was gone out of the room, and telling him he had ſomething to ſay to him, ſhews a

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ſedate mind, and a deliberate intention. The words *young man* were words of contempt, and the *ſomething he had to ſay to him* could be nothing but reſentment. He ſtaid in the room after all the reſt to have this opportunity of gratifying his revenge, and *that ſomething he had to ſay to him* is explained by the claſhing of ſwords which was heard immediately upon the other's return, and the ſhutting of the door, when he had that fatal opportunity of carrying his malicious expreſſions into execution.

It is true that he received three ſlight wounds in the engagement. But we think, in a caſe of this nature, that an interchange of wounds will not alter the caſe.

Theſe are the reaſons why we are all of opinion that the killing of Mr. *Gower* was of expreſs malice in the priſoner.

I ſhall now give anſwers to the objections which were made on behalf of the priſoner, and which have been duly weighed and conſidered by the judges.

It was objected, that this was no more than a ſudden quarrel, where there were provoking words and mutual aſſaults; that it does not appear the paſſions were ever cooled, and that indeed the law has fixed no time wherein it ſhall be preſumed the heat and fury of the party may be allayed, but it is to be left to the jury, and they have found that there was no reconciliation.

To this it may be anſwered in the firſt place, that there can be no preſumption in favour of death, *Kelyng* 27. And therefore in all caſes, it lies upon the ſlayer, to extenuate the fact, which *prima facie* is always murder.

In the next place I would obſerve, that it is going much too far, to ſay that this killing was upon a ſudden quarrel; but to take the objection in its full ſtrength, I will ſuppoſe it to be ſo, and then the anſwer I give to it is, that it manifeſtly appears, there was a ſufficient time wherein the priſoner might have cooled, and reaſon have reſumed her ſeat, becauſe the ſubſequent acts appear to be deliberate.

In caſes of this nature the judges are to determine what is malice, or what is a reaſonable time to cool; and they muſt do it upon the circumſtances of the caſe: the jury are judges only of the fact, and we muſt determine it to be deliberate or not. Hence it is, that in ſumming up an evidence the judges direct the jury, if you believe ſuch a fact, it is ſo; if not, it is otherwiſe; and they find either a general or ſpecial verdict upon it. There is no inſtance where the jury ever find that the fact was done out of malice, or that the party had or had not time to cool; but that muſt be left to the judges upon the circumſtances of the caſe. In

Holloway's caſe it was left to the Court to determine whether the tying the boy to the horſe's tail was not a malicious act. So in the caſe of the two boys who had quarrelled, and the father ran after one of them and killed him, the Court, and not the jury, determined whether it was malice or not. *Palm.* 545.

As the law has fixed no time when the paſſions ſhall be ſaid to cool, it muſt, and only can, be determined upon the circumſtances of each particular caſe. If any deliberate act appears, the queſtion is determined: the quarrelling in a morning, and deferring the fight till afternoon, is a deliberate act, that will make it murder. So in *Bromwick*'s caſe, 1 *Lev.* 180. the declining an immediate encounter, becauſe of the diſadvantage of his high heels, was held to be a deliberate act, that manifeſted a coolneſs: and the ſame has been held, where the parties have debated about the conveniency of place. *Kelyng* 56.

If A. ſays to B. I will give you a pot of ale to ſtrike me, and B. ſtrikes him, and immediately A. kills B. it is murder; for A. knew what he was about, and deliberated with himſelf how he might perpetrate the fact, and be at the ſame time, (as he thought) within the protection of the law. *H. P. C.* 48. *Cromp.* 49.

From all which caſes it appears, that though the law of *England* is peculiarly favourable in making this diſtinction with regard to the paſſions of men, yet it muſt be ſuch a paſſion as for the time deprives a man of the exerciſe of his reaſon; and wherever it has appeared that he had the exerciſe of his reaſon, he is out of the protection of the law, and has been guilty of murder.

Here was a reaſonable time to cool, and it is plain it had its operation: he was cool enough to diſcourſe for an hour, he determined in his own mind upon deliberation what he would do; and he declared his intention in thoſe bitter and deliberate expreſſions, "No, he would not paſs it over, damn him, he would have his blood; the young man muſt come back, for he had ſomething to ſay to him."

The interchange of blows, where there is malice, will make no alteration: it does not, indeed, appear who ſtruck firſt upon his returning into the room; but it is ſufficient, that the verdict finds no acts inconſiſtent with the malicious declaration of the party; nor can the declaration of the party deceaſed avail in this caſe, for that goes only to his receiving the wound in a fair manner with regard to the nature of the combat.

This is by no means to be reſembled to the caſe of Mr. *Turner;* for there was a provocation, and a blow given with a clog that women wear, and from thence it was not probable that death could enſue: and this appears to be the material ground of the judgment in that caſe, by oppoſing it to *Gray*'s caſe, who was held guilty of murder, becauſe the ſtroke was given with a bar of iron.

The very minute differences obſerved between this and *Mawgridge*'s caſe are no way conſiderable; ſince we are of opinion, that here is expreſs malice and there it was only implied; not that I would have it imagined, we think this caſe materially different from *Mawgridge*'s, on the contrary, I deſire it may be taken notice of, that we declare otherwiſe, though we adjudge this caſe principally upon the malice expreſſed.

Upon the whole, this Court, with the concurrent opinion of all the other judges, do hold, that the priſoner at the bar is guilty of the murder of *William Gower*.

Mr. Juſtice *Forteſcue*, in a very ſerious ſpeech, pronounced the ſentence for his execution: which was appointed for *Monday* the 3d of *July*. Upon the morning whereof he opened a vein, and bled to death, to avoid the infamy of an execution. *John Oneby*'s caſe, *King's-Bench*, 2 *Strange's Reports*, 766. 1726.

The Caſe of PLUMMER.

PLUMMER was indicted for murder on the following facts, found by a ſpecial verdict.

Eight perſons having a deſign to tranſport great quantities of wool contrary to law, were with horſes laden with wool, on their way towards the ſea ſide: at twelve at night, the king's officers duly appointed, having notice thereof, in order to ſeize the wool and apprehend the perſons, way-laid them in a certain lane through which they were to paſs, and hearing them coming gave the word of ſeizure; whereupon one of the eight perſons having a fuzee laden with powder and ball in his hand, fired it off and kills *J. S.* one of his own gang. *Plummer* was one of the eight perſons, and preſent at the diſcharging of the fuzee: and the queſtion was, whether he was guilty of murder. And the Chief Juſtice declared, that for as much as this caſe ſeemed of very great conſequence it had been for two vacations under the conſideration of all the judges of *England*, before whom it had been ſeveral times argued; and that upon very great deliberation they had all unanimouſly reſolved,

ſolved, that it is not murder in him. And now he openly in Court declared the reaſons of their reſolution, to this effect:

Firſt, It is to be conſidered, that it does not appear any where in the verdict, that the perſon who did ſhoot off the fuzee did ſhoot it againſt any of the king's officers, for if that had been found, it had been murder in them all; but that not being found we cannot intend it; though upon the circumſtances of the evidence, as it did appear, there was enough for the jury to have found ſuch a verdict. For 1. They were doing an unlawful act. 2. They were armed. 3. It was late at night, and the fuzee was diſcharged upon the word ſeizure being given; and it cannot be eaſily thought that it was diſcharged upon one of their own gang, and not againſt the king's officers, upon this evidence and theſe circumſtances. But this is matter of evidence for a jury to find the fact, and not for judges to intend it here upon a ſpecial verdict; and therefore, though it might be a good foundation for a verdict, it cannot be ſo for an intendment. For in a ſpecial verdict, whereby any man is to be charged or hurt, or convicted, though the jury find matter of evidence enough for them to find the fact, and to give a verdict againſt him, yet if they do not find the fact, ſuch matter, though pregnant evidence, cannot be enough to impower the judges to intend the fact, or condemn him as guilty of it. And ſo here, though there be great evidence to prove that the fuzee was diſcharged againſt the king's officer; yet, becauſe it is poſſible it might be by chance, or other misfortune, we muſt rather intend it to have been fired upon ſome other occaſion than againſt the king's officer.

Secondly, So there are two things to be conſidered in this caſe. 1. The fuzee's not being ſhot off againſt the king's officers, but rather upon ſome other account, what crime is it in him that diſcharged it? 2 If it be murder in him that did ſhoot it, it will be fit to be known what crime it will be in them who were preſent of his ſide, and how far they will be concerned in it?

1. It is plain that he, that did diſcharge it, and all the reſt, were engaged in an unlawful act and deſign; and if he, in purſuance of that, diſcharged the fuzee, though he had not killed the perſon intended, but another, the offence would be in the ſame degree as if he had killed the perſon he intended to kill. Vide *Dy.* 128, *pl.* 16. *Crompt.* 101. *pl.* 474. 9 *Co.* 91.

Now

Now then ſince we cannot take it for granted that he did diſcharge this fuzee againſt any of the king's officers, or other perſon, what offence will this act be in them that did it? and, as it does appear, it can be no more than manſlaughter in him. And here it was doubted by ſome whether it might not be intended that he did it by accident. But per *Holt*, that cannot be intended; for though in an indictment of manſlaughter *it be neceſſary to ſay that it was done voluntarily*, yet it is not neceſſary it ſhould be ſo found in a ſpecial verdict; for if it be found that he did the act without any more, it muſt be underſtood that he did it voluntarily, as it is laid in the indictment, if the contrary do not appear; for man is a free agent, and what he does muſt be intended to be done voluntarily, if the contrary does not appear. And in all caſes where a man is indicted for murder or manſlaughter, if it appear on evidence, that the fact was done by misfortune *it muſt be ſo found ſpecially by the jury*. And if it be not ſo found ſpecially, but that he killed generally, it muſt be intended that he did it with his will, and conſequently it muſt be intended that this act in queſtion was done voluntarily, and therefore, as the caſe is, it muſt be manſlaughter.

But ſuppoſe it had been found by the jury, that the man who diſcharged the fuzee did it of malice prepenſe, and thereby one of his gang is killed, it could not affect any of the reſt, as this caſe is; for though they are all engaged in an unlawful act and deſign, and that the general notion be, that where two are engaged in an unlawful act, and that by the act of one a man is killed, it will be murder in the other, though he has done nothing, yet his being originally engaged in the unlawful act, it makes him guilty of murder. And this, it is true, is a general received opinion, but it has ſeveral qualifications and limitations.

1. To make one an abettor in ſuch a caſe, it is neceſſary he ſhould know of the malicious deſign, that is, that it was unlawful: for if he be ignorant of the deſign, though he be engaged in the unlawful act foreign from the deſign, he ſhall not be guilty of murder. For it is poſſible that if divers perſons be engaged in an unlawful act, that one of them may have a particular malice againſt another of them, and the reſt know nothing of it; and his taking the opportunity of putting that malice in execution, when he and others are engaged in an unlawful act, cannot make the reſt guilty; for it would be extreme hard to make any of the reſt an abettor to a collateral act, to the malice whereof they

they were no way privy. *Hale tit. Murder, pl.* 101. *Cromp.* 23. A. has malice to B. and engages in a duel with him, C. a ſtranger comes by chance and ſides with A. and A. kills B. this is murder in A. and C. who was preſent abetting and aſſiſting, is only guilty of manſlaughter: why? becauſe he came there of a ſudden, and knew nothing of the premeditated malice; ſo, though it was not warrantable for him to meddle in the quarrel, yet becauſe of *his ignorance of the malice*, he was only guilty of manſlaughter. If a company of thieves go upon a deſign to rob a houſe, or to rob on the highway, and two of them quarrel, and one kills the other, and that there was no malice prepenſe, but a ſudden quarrel, it is only manſlaughter in him, and no crime at all in his companions, though they were all engaged in an unlawful act. And he quoted a caſe which happened on evidence at the *Old Bailey*, in *December* 1664. The Secretary of State made his warrant to apprehend divers ſuſpected perſons, directed to the meſſengers: the meſſengers having notice of their being in ſuch a houſe, took ſeveral ſoldiers with them to aſſiſt them to apprehend the perſons, but took no civil officer with them, neither did they make any demand to have the door opened, as they ought by law to do, but broke open the door, and when they had broke open the door, ſome of the ſoldiers fell a plundering, and ſtole away ſome goods; and the queſtion was, Whether this were felony in them all? That they were all engaged in an unlawful act, is plain, for they could not juſtify breaking a man's houſe, without making demand firſt; and in that caſe all thoſe who were not privy to the ſtealing were acquitted, notwithſtanding their being originally engaged in one unlawful act of breaking the door; and the reaſon was, becauſe they knew not of any ſuch intent, but it was a chance opportunity of ſtealing, whereupon ſome of them did lay hands.

2. The act of one, whereby death doth enſue, muſt be in purſuance of the original unlawful act. Now in the principal caſe, it does not appear that *J. S. was killed in purſuance of the original unlawful act*, but that another took this opportunity to kill him: divers come to hunt in a park, and the keeper comes and commands them to ſtand, and would arreſt one of them, and they reſiſt, and one of them in the ſcuffle kills the other, it is murder in them all; becauſe they were doing an unlawful act, and would not ſtand but reſiſted, and in purſuance of that unlawful act a man was killed. 2 *Rol. Rep.* 120. *Palm* 30. and the Lord *Dacre's* caſe

caſe in *More*. But if divers had come into a park to hunt where they have no right to hunt, and immediately after two of them quarrel, and one of them kills the other, it is only manſlaughter in him that kills, and no offence in the reſt; becauſe the killing was not in purſuance of the unlawful act that they were all engaged in. And it might be in this caſe, that he that did kill *J. S.* had a private grudge to him, and took this opportunity of putting it in execution; and there was ſome evidence, that the man that killed *J. S.* here did ſuſpect him to have diſcovered the deſign, and therefore killed him, and this perhaps the reſt knew nothing of: and it would be very ſevere that they, who were not privy to the malice, ſhould be guilty, if the knowledge of this matter lay hid in the breaſt of him who did the act. Wherever divers are concerned in a riot, or other unlawful act, and in carrying it on, one is killed, though it be by chance, it will be murder in all. *Dyer* 128. Divers perſons came to force away goods out of a man's houſe, by colour of an authority of the Lord Admiral, and would break into the houſe, and a woman, who was coming out of the houſe, was killed by a ſtone flung by one of the aggreſſors at one of thoſe that made oppoſition; and it was murder in them all, by the better opinion; and we all hold the law to be ſo: and at the end of that caſe this caſe is put: A. and C. are fighting a duel, and B. comes to part them, A. kills B. it is agreed to be murder in A. and ſome held it to be ſo in C. too, though he did nothing; but the better opinion is, that it is not murder in C. though he was preſent doing an unlawful act, but he did not oppoſe B. as A. did, and killed B. becauſe he would not let him kill another; and yet in that caſe C. had as much a murderous intent as A. had, though not to kill B. for A. and C. had a reciprocal malice againſt one another.

The third qualification to the rule is, that the unlawful act ought to be deliberate, for if it be done of a ſudden, the death occaſioned in purſuance of it will not amount to murder. As ſuppoſe a ſudden quarrel happens between ſeveral perſons, whereby the peace is broke, and a conſtable comes to part them, and they continue on for a time, and will not obey the conſtable, and the conſtable is killed in the fray; yet if they did not know that he was a conſtable, and that he came to keep the peace, ſo that they take notice of the occaſion of his coming, it will be manſlaughter in him that kills, and no offence in the reſt. And ſo it was reſolved at the *Old Bailey*, in one *Thomſon*'s caſe; he and his wife fell out and

and were fighting, the landlord where they lodged came to part them, and to keep the peace: *Thompſon* with great force took him and flung him upon an iron bar that ſtood in the chimney, and broke his rib, whereof he died; and it was held to be manſlaughter, becauſe that though he was doing an unlawful act, and that the landlord, or any other, had as much authority to keep the peace as if he were actually a conſtable; and the killing of one who comes to command the peace, though he be no conſtable, is as much murder as to kill a conſtable: and that if he had declared that he was come to keep the peace, and commanded them to keep the peace, whereby they might take notice of the cauſe of his coming, and notwithſtanding that they had killed him, it would be murder; yet this not being ſo, it was only manſlaughter, becauſe the original quarrel was ſudden. But if it had been a deliberate act, whether he knew him to be a conſtable or not, or that he came to keep the peace or not, if he kill any body whatever, that reſiſt him, it will be murder in him, and all that join with him in the deliberate act. 2 *Ro. Rep.* 460. In an appeal of murder by *Clement* againſt *Blunt*, the caſe was, A. and B. quarrel about a dog, which A. had promiſed to B. but after refuſed to give it him; upon which B. goes home for his ſword, and comes back to the place where A. was, and underſtanding that he was gone home, he follows him home, and demands the dog, and would come into his houſe to ſearch for the dog, and A. refuſes him entrance, and the other preſſes in, and being oppoſed, in the ſcuffle kills A. it was held here at the bar to be only manſlaughter; yet B. was doing an unlawful act, viz. entering into a man's houſe againſt his will, and A. was killed in purſuance of ſuch an unlawful act; and the only reaſon of that reſolution muſt be, becauſe the unlawful act in which B. was concerned, was a ſudden one, and without deliberation. And *Hales Pl. Cor.* 51, 57. inſiſts very much upon it, that the unlawful act muſt be with deliberation, otherwiſe the killing cannot be murder.

In the fourth place, as the unlawful act ought to be with deliberation, ſo it ought to do hurt to ſomebody, either immediately or conſequentially, otherwiſe the killing will not be murder. *Dalt.* 218. *Br. Cor.* 171. *Stunf.* 40. *Hale*, 51, 57. that the unlawful act muſt be deliberate and mediately or immediately tending to hurt ſomebody. A man goes to ſhoot a deer in another man's park, and the arrow ſtriking againſt a tree, glances and kills a man, it can be no more than manſlaughter, though 3d *Inſt.* 56, 57, be to the contrary, becauſe it is an unlawful act.

In

In the fifth place, it is fit to be known, in relation to that rule, that it muſt be a deliberate unlawful act, tending mediately or immediately to the hurt of ſome perſon: yet if it be unlawful, it will be manſlaughter. Again, though it be not with deſign to hurt any perſon, yet if it be ſuch an unlawful act as is felony, or carried on with a felonious intent, and in purſuance of ſuch act a man is killed, ſuch killing is murder, not only in him by whoſe hand the perſon falls, but alſo in all thoſe concerned in the felonious intent. As if divers agree to rob a houſe, and ſome of them are placed in a paſſage leading to the houſe to watch for the reſt, and the others go to rob the houſe; and a perſon happens to come by who is ſtopped by thoſe placed in the paſſage, and in the ſcuffle is killed by one of them, and no robbery is committed; yet this will be murder in all thoſe that were by then, and likewiſe in all thoſe that went to rob the houſe and were not actually preſent. 3d *Inſt.* 56. A man goes to ſhoot another man's hen, and chances to kill a man, it is murder ſays the book, but that muſt be intended that he ſhot the hen with intent to ſteal it, and then becauſe a felonious intent was at bottom, it will be murder, otherwiſe that caſe cannot be law.

So firſt we all agree, that though the perſon, that ſhot off this fuzee, did it with intent to kill *J. S.* out of a premeditated malice he had againſt him; yet ſuch as did not know of ſuch deſign, though preſent at the time, and engaged in an unlawful act with him that did diſcharge the fuzee, cannot be guilty of murder.

Secondly, We all agree, that if it were found that the fuzee had been diſcharged in oppoſition to, or againſt any of the king's officers, and thereby the ſaid *J. S.* is killed, it would be murder in them all; ſo that not being found, we cannot intend it; therefore the priſoner muſt be acquitted. 12 *Modern Reports*, 627. A. D. 1701.

MAIMING AND DISFIGURING.

TO conſtitute the crime of Murder there muſt be an *actual killing*, for a bare aſſault, with *intent to kill*, is only a great miſdemeanor.

This was made a very curious ground of defence, in a proſecution on the 22d and 23d *Charles* II. c. 1. called the Coventry Act, ſo called on account of an aſſault on Sir *John Coventry* in the ſtreet, and ſlitting his noſe, in revenge (as was ſuppoſed) for ſome obnoxious words uttered by him in parliament.

This ſtatute recited that "Whereas upon the one and twentieth day of *December* in the year of our Lord one thouſand ſix hundred and twenty, a violent and inhuman attempt was made upon the perſon of Sir *John Coventry* knight, of the honourable order of the *Bath*, being a member of the Commons-Houſe of Parliament, and then attending the Parliament, and upon the perſon of his ſervant *William Wykes*, by a conſiderable number of armed men, both on foot and horſeback, whereby the ſaid Sir *John Coventry*, and his ſaid ſervant then loſt ſeveral goods, and the ſaid Sir *John Coventry* received divers wounds, ſome of which were given him in ſuch barbarous manner, that ſome of the offenders held him whilſt others wounded him." It was therefore enacted, That if any perſon ſhall of malice aforethought, and by lying in wait, unlawfully cut out or diſable the tongue, put out an eye, ſlit the noſe, cut off a noſe or lip, or cut off or diſable any limb or member of any other perſon, *with intent to maim or to diſfigure him*, ſuch perſon, his counſellors, aiders, and abettors, ſhall ſuffer death without benefit of clergy.

On this ſtatute *Arundel Coke*, Eſq. a gentleman of *Suffolk*, and *John Woodburne*, a labourer, were indicted on the 13th of *March* 1721, at *Edmundſbury* in *Suffolk*; *Coke* for hiring and abetting *Woodburne*, and *Woodburne* for the actual fact of *ſlitting the noſe* of Mr. *Criſpe*, *Coke*'s brother-in-law. The caſe was ſomewhat ſingular.—The murder of *Criſpe* was intended, and he was left for dead. Now the bare intent to murder is no felony, but to diſfigure, with an intent to diſfigure, is made ſo by the Coventry Act abovementioned, on

on which they were therefore indicted: and *Coke*, who was a diſgrace to the profeſſion of the law, had the effrontery to reſt his defence upon this point, that the aſſault was committed with an intent to murder, and therefore not within the ſtatute.

The circumſtances were as follow: *Criſpe* was poſſeſſed of an eſtate of 300l. *per annum*, and having three ſiſters, *Coke* the priſoner married one of them, and as Mr. *Criſpe* had no children, *Coke*, in right of his wife, would have been entitled to a third part of Mr. *Criſpe*'s real eſtate on his death. But being too impatient to wait for *Criſpe*'s death in the natural way, he tampered with ſeveral poor people to murder *Criſpe*, for certain rewards he offered them, and at length prevailed on the priſoner *Woodburne*, after much importunity and a promiſe of twenty pounds reward, to undertake it. This *Woodburne* was a labouring man, who had ten children, and was very poor; and working ſometimes for *Coke* had been relieved in his neceſſity by him, and ſcarce knew how to deny any thing he put upon him. *Woodburne* no ſooner conſented to commit the murder, but *Coke* invited *Criſpe* to ſupper with him on *New-Year's-Day*, 1721-2; and his houſe being near the church-yard in *Bury*, he ordered *Woodburne* to wait for him in the porch of a houſe that ſtood in the church-yard, at eight in the evening, and to ſtay there till he came to him. *Criſpe*, on his brother *Coke*'s invitation came to ſup with him on *New-Year's-Day* in the evening; as did alſo Mr. *Brown* who had married *Coke*'s ſiſter; *Coke* before ſupper propoſed to Mr. *Criſpe* the going to ſee one Mrs. *Fanny Monke*, who lived in the church-yard, but he did not ſeem inclined to go then; whereupon *Coke* went out by himſelf; and meeting *Woodburne* in the church-yard, who had prepared his wood-bill in order to commit the fact, *Coke* told him that *Criſpe* was very merry, and he believed it would be late before he came out; but the later the better, and bid *Woodburne* to continue there till they came out. After ſupper, about ten o'clock, *Coke* called *Criſpe* out of his parlour, and they went together into the church-yard it being very dark; and having taken two or three turns before the houſe of Mrs. *Monke* already mentioned, *Coke* ſtood ſtill, and hallooed, and immediately *Woodburne* came up to them and ſtruck *Criſpe* on the face with his bill, and giving him four or five ſtrokes more he fell down in a ſwoon, and *Coke* and *Woodburne* left him there for dead. *Coke* returned out of breath to his own houſe, and being aſked by Mr. *Brown* what was become of *Criſpe*, he ſaid, he believed

he was gone home; but they had not ſat above a quarter of an hour before *Criſpe*, who had recovered from his ſwoon, came in with all his fleſh cut off his face, and his cheeks hanging down upon his breaſt, to the great ſurpriſe of the family. Theſe circumſtances being proved,

Mr. *Raby*, one of the counſel for the proſecution, addreſſed the Court: My Lord, having gone through our evidence, you will now permit me to make ſome few obſervations upon what has been offered, and from which we humbly apprehend it will moſt clearly appear, that we have fully proved and made out every thing neceſſary to maintain this indictment.

My Lord, it muſt be agreed, that this is an offence created by a particular act of parliament, uſually called Sir *John Coventry*'s act, made on the occaſion of the like barbarous uſage he met with, to puniſh that offence, and to prevent the like for the future: and I alſo agree, that the priſoners muſt appear to be guilty of thoſe very facts, which by that act are made felony, or otherwiſe they cannot be puniſhed by that law. But we humbly apprehend, that when that law, and the evidence which has been given againſt the priſoners are conſidered, they will appear to be guilty within the expreſs words of that law; for which end I beg leave to mention that act, which is the 22 and 23 *Car.* II. *cap.* 1. The words are theſe: "That if any perſon or perſons, on purpoſe, and of malice fore-thought, and by lying in wait, ſhall unlawfully cut or diſable the tongue, put out an eye, ſlit the noſe, &c. with an intention in ſo doing to maim or disfigure, in any the manners before-mentioned, the perſon or perſons ſo offending, their counſellors, aiders, and abettors (knowing of and privy to the offence aforeſaid) ſhall be felons, &c."

From this clauſe it appears the offence muſt be done,

1. Of malice fore-thought.
2. By lying in wait.
3. By ſlitting the noſe, &c.
4. With an intention to maim or disfigure.

And we humbly ſubmit it, that from the evidence which has been given againſt the priſoners, it moſt plainly appears, that the defendants are guilty of this offence in every circumſtance deſcribed by this act of parliament.

1. For certainly there cannot be the leaſt queſtion, but that this was done of malice fore-thought, when it appears from the evidence to have been under conſideration and premeditated for three years and an half: and Mr. *Coke* had tried ſeveral perſons, before he could find any ſo hardy as to exe-

cute his baſe purpoſe, or comply with ſo inhuman an attempt; and therefore we apprehend there cannot be any colour to ſay, this was not of malice fore-thought.

2. And that this offence was alſo done with lying in wait is as clear: for does it not fully appear upon the evidence of Mr. *Criſpe*, that when he came out of Mr. *Coke*'s houſe, Mr. *Coke* gave a whiſtle or ſignal? In vain had Mr. *Coke* given that ſignal, if no perſon had been in waiting to have heard it: to what end had that ſignal been given, if Mr. *Coke* had not known there was ſome perſon to have heard it? It appears plainly *Woodburne* came upon the ſignal given; and what enſued you have heard, I need not repeat.

3. The third thing made material by this act, is, That the noſe ſhould be ſlit; and that the noſe was ſlit appears from the ſurgeon's evidence, who has given a very particular account of the ſeven wounds Mr. *Criſpe* received in his face and head: and he ſays, the noſe (the noſtril) was cut through.

4. Whether the other circumſtance, that this was done with an intent to maim and diſfigure, does ſufficiently appear, or not, is the only queſtion that remains: and we ſubmit it to your conſideration, as that which is very clear from this evidence.

Mens acts are the beſt interpreters of their intents: if a man kills another without provocation, though no expreſs malice or malicious intent appears, yet the very act of the party has always been taken to be a ſufficient proof of his intent and malice fore-thought. The intent is latent in the mind, and can ſeldom be known otherwiſe than by the act which is done; and as there the malicious intent is collected from the act of the party, ſo here it is as reaſonable to collect his intent to diſfigure from the act which is done, the maiming and diſfiguring Mr. *Criſpe*: and the very manner of doing it ſpeaks it.

Whoever looks upon this gentleman (Mr. *Criſpe*) ſees too plainly how much he is diſfigured: and could a man cut another ſeven times on the head and face with this iron bill, with this weapon, without diſfiguring him? Is it to be imagined? And when he has done the very act, when he has diſfigured him, ſhall he ſay, he had no ſuch intent? The act done, and the manner of doing it, ſpeak it too plainly. It is confeſſed the intent was to murder; this is what both the priſoners admit to be the end deſigned; but did they not alſo intend the means? It would be in vain to intend the end, and reject the means to effect it: the means

choſen to effect it have appeared to be to cut him to death, by ſtriking him with a bill on the head and face: is it poſſible to expect to cut him to death on the face with the weapon produced, and not to disfigure him? This is the act *Woodburne* has done, and *Coke* was preſent when *Woodburne* ſtruck, even when he did this fact, and *Coke* was a counſeller, aider and abetter: he was preſent, and, in the words of the act of parliament, knowing of the offence. And therefore upon this evidence we ſubmit it, whether we have not given ſatisfaction to the Court and jury, that the priſoners are guilty.

This is not a proſecution of the party injured, ariſing from revenge or reſentment, but is carried on by the public, by the crown, for the ſake only of public juſtice, that by the puniſhment of this offence, the ſubjects may have that protection they ought to have by a due execution of the laws: and all we pray is, that the jury will give ſuch a verdict as is agreeable to juſtice.

Lord Chief Juſtice. Woodburne, what have you to ſay for yourſelf?

Woodburne. May it pleaſe your honour, my Lord, the firſt time that *Coke* began with me about this matter was on a *Wedneſday* in laſt barley harveſt. He ſent for me to mend his copper, and after I had done it, he bid me go to the further end of the *Mill-Lane*, and there he muſt ſpeak with me, and which came firſt ſhould ſtay for the other. I was there before him; when he came he was on horſeback, and his horſe kicked about in a furious manner, that the people took notice of it. When they were gone, he told me, that he had a thing for me to do, but not to be done preſently, and that if I did it I ſhould want for nothing. I aſked him what it was. He ſaid about Mr. *Criſpe*, to ſet him aſide, that is, to kill him: but he ſaid, it was not to be done preſently: ſo he put his hand in his pocket and gave me eighteen pence. I told him, I never did ſuch a thing in my life; I could not do it. Said he, it is not to be done preſently, we have time to conſider. A while after he ſent for me again, and aſked me, whether I had conſidered of it. I told him, I could not do it. Said he, we muſt ſet *Criſpe* aſide; for Mrs. *Criſpe* hath got a trick to play; ſhe will make away what there is from me and my child. I ſaid, I never did any ſuch thing; I could not do it, and deſired him to forbear. I went away and left him in his chamber. Within a while after he came to my houſe; ſaid he, *John*, what is the reaſon you can't do this for me? Said I, I cannot do it. Said he, what ſignifies it, I would do it for you. I ſaid, I could not do it. Then he

he went away very uneaſy, and in a week or fortnight ſent for me again to his chamber, and there was at me again. I told him I could do no ſuch work. Said he, why can't you do this work? I have been a good maſter to you, I made myſelf look little to bail you when you were in goal. I turned about and cried. Said he, what makes you cry? Your crying ſignifies nothing: the money that I ſhall give you will do you and your family a kindneſs. Said I, I can do no ſuch thing. Said he, it ſignifies no more the killing of him, than to kill a dog, for they do no good with what they have. Yes, ſaid I, Mr. *Criſpe* is a very good maſter; I worked for him and his father before him: and ſo I went away. Afterwards my wife died three days before *Gunpowder-Treaſon* laſt: ſhe was buried on that day, and being very poor, I ſent my daughter to deſire a little money of him to have the bell tolled for my wife; but he ſent me none. My wife was buried on a *Sunday*, then on the *Monday* he ſent his boy for me; I went down to him, and when I came, I fell a weeping for the loſs of my wife, and having ten children. Said he, what makes you cry? You muſt pull up a good heart; though your wife be dead, you may have friends; here is that which will do you a kindneſs hereafter. Said I, I am very ſorry for the loſs of my wife. Said he, what ſignifies that? She was carried well into the church, and is, no doubt, happy; ſhe is gone before you; we muſt all go in our time: I was a friend to you in her illneſs; I ſent her a good doctor at my own charge: this twenty pounds that I will give you will be a brave eſtate for you.

Lord Chief Juſtice. What where you to have this twenty pounds for?

Woodburne. It was to kill Mr. *Criſpe;* he told me that I muſt ſet aſide Mr. *Criſpe;* he offered me twenty pounds to do it; but I then refuſed it.

On *Monday*, *New-Year's-Day*, in the morning, *Coke* ſent his boy for me to come to him; and between eight and nine in the morning I went to him. He was in his green room. Now, ſaid he, *John*, we ſhall have the faireſt opportunity to kill Mr. *Criſpe*. I told him, I was loth to do it; it was very cold, and I had an ague. Said he, I will give you that which ſhall warm you. He went to his cloſet, and gave me out of the bottle that he uſed to carry in his pocket, half a pint of brandy, and told me, that happen how it will I muſt not come near his houſe any more that day, leſt afterwards there ſhould be ſome ſuſpicion; but ſaid he, whether ague or not, you muſt be at Mr. *Morrice's*

rice's porch, which is in the church-yard, about eight o'clock in the evening. I went there between eight and nine; about nine *Coke* came out, and gave me a whiſtle; on that I went up to him; he told me, Mr. *Criſpe* was very jolly, and he believed it would be late before he came out. I told him, I did not care to ſtay. Said he, you muſt ſtay now; this is the time that will do it. I ſtaid till ten o'clock; then he came to me again in Mr. *Morrice*'s porch, and told me, that he believed *Criſpe* would not go till eleven o'clock; but the later the better. Then he went from me again, and a little time after ten *Coke* and *Criſpe* came out together, and on *Coke*'s whiſtling I came up to them; *Criſpe* was then before, and coming to get againſt the wall. I came up to *Coke*; he bid me have a care not to hit him inſtead of *Criſpe*, being very dark; ſo he took me by the ſleeve to lead me up to *Criſpe*; and ſaid to *Criſpe*, Brother, ſtand ſtill; on that I hit him two ſtrokes with my hook: though I never heard him ſwear before, yet he now ſwore, God damn him: on that *Coke* ſaid, What! doth he ſwear? ſecure him, down with him. He ſtood by him till I gave him ſeveral blows, and then he went away. *Coke* deſired me to take away his watch; for, ſaith he, as to his money, he don't carry above half a crown or three ſhillings in his pocket; and when I go to *London*, I will ſell the watch for you.

Lord Chief Juſtice. What *Woodburne* ſaith againſt *Coke*, is no evidence againſt *Coke*, and ſhould not have been mentioned by him; but what he ſaith relating to himſelf before the fact, is ſo twiſted with *Coke*, that without the whole it is not ſo intelligible as to himſelf. However, the jury are to take notice, that what *Woodburne* ſaith, is only evidence againſt himſelf, and not againſt Mr. *Coke*.

Lord Chief Juſtice. After you had given him thoſe ſeveral blows with your hook, what did you next?

Woodburne. I began immediately to reflect on what I had done, and went away forthwith to my own houſe, where I was about to take a line and hang myſelf.

Lord Chief Juſtice. Have you any witneſſes, or any body to ſpeak for you?

Woodburne. My Lord, here are my two daughters in the Court; I deſire your Lordſhip would be pleaſed to hear them, *Ann Woodburne* and *Sarah Woodburne;* who being called, appeared, and were ſworn.

Lord Chief Juſtice. What ſay you, *Ann Woodburne?*

Ann Woodburne. On the *Wedneſday* before *New-Year's-Day* *Coke* ſent for my father by his boy; I told the boy my father

father was in bed, and ſick of an ague, and could not come. The boy came again, and ſaid, my father muſt by all means come; but he would not then go, but he went to him on *New-Year's-Day* in the morning, and came home again. About five or ſix o'clock in the evening, my father went out with a hook in his hand; and he ſaid, he ſhould not be at home till eleven or twelve at night; and if any body came for him, he bid us not take any notice but that he was at home. We thought he took the hook to cut ſome wood with.

Lord Chief Juſtice. Have you any thing more to ſay?

Ann Woodburne. When my mother died, I went to Mr. *Coke*'s to borrow five ſhillings of him, to have the great bell toll for my mother, and told him, that my father would pay him again. He ſaid, What ſignified the ringing of the great bell? her ſoul would be never the better for it; but if he will ſatisfy me in my requeſt, he ſhall have five times five ſhillings.

Lord Chief Juſtice. What ſay you, *Sarah Woodburne?*

Sarah Woodburne. Coke did frequently ſend for my father at all times both of day and night; and he would often come to my father, and when he came, they would go out, and walk down the yard, and talk together. After this fact was done, *Coke* ſent his boy for my father, and the boy ſaid, they muſt not go together; for if they did, people would take notice of them.

Lord Chief Juſtice. Woodburne, have you any thing more to ſay?

Woodburne. This day nine weeks, which was a week after the fact was committed, *Coke* ſent for me, and ſaid, *John,* I wiſh you would have done the thing I ordered you; but you have been before Alderman *Wright* and the Recorder, and have told your ſtory well; but hold you faſt, they will examine you again; I ſhall——

Lord Chief Juſtice. This is ſubſequent to the fact, and is not evidence againſt *Coke.* If you *Woodburne* have done, then Mr. *Coke* what have you to ſay for yourſelf?

Coke. May it pleaſe your Lordſhip, I am much aſhamed, and very unable to defend myſelf; I am aſhamed to think I ſhould be concerned in ſo heinous a crime againſt Mr. *Criſpe*'s life; I am even confounded at it; it is indeed a very great crime, and I know not what to ſay for myſelf. As for *Woodburne,* he hath aſſerted againſt me ſeveral things that are falſe.

Lord Chief Juſtice. I have told the jury, that what he hath ſaid is no evidence againſt you.

Coke.

Coke. When I firſt ſpoke of this matter to *Woodburne*, he ſaid, he ſhould value it no more than the cutting off the head of a dog. I did, indeed, go out with Mr. *Criſpe* that night, but I was not near when *Woodburne* ſtruck him, but retreated to my own houſe in a moment. My Lord, I am very ſenſible that a point of law may ariſe on the ſtatute whereon I am indicted.

Lord Chief Juſtice. Whereon?

Coke. With reſpect to my intention.

Lord Chief Juſtice. Your intention is matter of fact, and muſt be tried by the jury, whether your intent was to maim and disfigure; this doth not ſeem to me to be a point of law; if there be any point of law that ſhall ariſe, you ſhall have counſel to ſpeak to it; but whether you ſlit Mr. *Criſpe*'s noſe with an intention to disfigure him, is a matter of fact.

Coke. My intent was to kill Mr. *Criſpe*, and not to maim or disfigure him.

Lord Chief Juſtice. But that is the queſtion the jury are to try, whether you did not of malice ſlit his noſe, with an intent to disfigure him. If the jury do not find that you ſo did, you muſt be acquitted on this indictment. Suppoſing your deſign was to kill, yet your deſign might be likewiſe to maim; and this the jury muſt try; this is matter of fact for their conſideration.

Coke. This is a very penal ſtatute, and I am unable to plead my own cauſe; I beg your Lordſhip to aſſign me counſel.

Lord Chief Juſtice. If any point of law doth ariſe upon the ſtatute, you ſhall have counſel; but as yet there is nothing but matter of fact; whether the fact proved doth ſupport the charge in the indictment; or in other words, whether the evidence be ſufficient to make good the charge; this muſt be left to the jury; I will ſtate the fact to them, and they are on their oaths to give in their verdict.

Coke. This is a very penal ſtatute, and I cannot argue it for myſelf; I hope your lordſhip will aſſign me counſel; this is the firſt indictment that ever was upon this ſtatute.

Lord Chief Juſtice. What do the king's counſel ſay to it?

Serjeant Selby. After ſo full an anſwer as your Lordſhip has given, I think it but vain to ſay any things; I always thought that no matter of law could ariſe upon this fact and indictment; for *Woodburne* did the fact of malice forethought, by lying in wait, and with an intention to maim; Mr. *Coke* was aiding, abetting, and privy to the fact: therefore though it was an intent to kill, it muſt be to maim

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alſo; he could not intend to kill him with ſuch an inſtrument, without intending to maim him firſt; and therefore, if there were two intentions and but one executed, there is no pretence to ſay, that what was executed was not intended. Mr. *Coke* ſays, that never was any indictment before upon this ſtatute; if not, it muſt be becauſe no man before ever thought of being guilty of ſo horrid an action.

Lord Chief Juſtice. If any point in law doth ariſe you ſhall have counſel; but the fact muſt be agreed and ſtated, before the law can come in debate. You ſay, your intent was only to murder; but that is not yet agreed or found to be the fact: it is the point now in trial, whether you did it not with an intention to maim or disfigure; and according as that intention ſhall appear to the jury, ſo will they either acquit or convict you; therefore if you have any thing more to ſay, I deſire you to go on.

Coke. I ſubmit to your lordſhip's judgment.

Lord Chief Juſtice now ſummed up the evidence; after which he ſaid, This is the ſubſtance of the evidence given againſt the priſoners at the bar, to prove that they maliciouſly, and by lying in wait, have ſlit Mr. *Criſpe*'s noſe, with an intent to disfigure him therein.

Woodburne doth not deny the general fact, that is, the deſigned lying in wait to aſſault Mr. *Criſpe*, nor the cutting or knocking him down with his hook; his confeſſion is not evidence againſt *Coke*, but it is againſt himſelf; and you hear what he hath owned; that laſt barley-harveſt *Coke* ſent for him to mend his copper, and then ordered him to meet him at another place, which was accordingly done; where *Coke* told him, That he had a thing for him to do, but it was not to be done preſently; and if he would do it, he ſhould want for nothing. And when he aſked him what it was? He ſaid, To ſet *Criſpe* aſide, that is, to kill him; and *Coke* gave him eighteen pence. That then he told him, he could not do it; that *Coke* ſolicited him ſeveral times afterwards to murder *Criſpe*; the particulars whereof I do not enumerate, becauſe they principally relate to *Coke*, againſt whom it is not evidence; but yet they ſo far relate to *Woodburne*, as to ſhew his knowledge and deliberation in this matter; therefore to come to the day whereon this fact was done, *Woodburne* ſaith, That about eight or nine in the morning *Coke* ſent for him, and told him, that that day they would have the faireſt opportunity to kill Mr. *Criſpe*; and it was agreed between them, that *Woodburne* ſhould be in the church-yard, at Mr. *Morrice*'s

rice's porch, about eight o'clock in the evening. He accordingly went with his hedge-hook or bill, which hath been here produced. *Coke* came out to him twice by himſelf, and the third time a little after ten o'clock, *Coke* and *Criſpe* came out together; and then *Coke* whiſtled, which was the ſignal between them; and whereon *Woodburne* came up, and owns, that with the hook he cut and knocked down *Criſpe*, and that though he never heard *Criſpe* ſwear before, yet that now, as *Criſpe* was falling, he ſwore God damn him; whereupon he gave him thoſe ſeveral other wounds and blows that *Criſpe* received; and then reflecting on what he had done, immediately went to his own houſe, where he was about to take a rope and hang himſelf.

By this defence of *Woodburne*, you ſee that he doth not deny the aſſaulting and wounding Mr. *Criſpe;* but that which he chiefly inſiſts on is, that what he did was by the ſolicitation and procurement of Mr. *Coke*; which is no juſtification or excuſe. However, he hath called two witneſſes, *Anne* and *Sarah Woodburne*, his two daughters, to prove that *Coke* did frequently ſend for their father, and often came to him at his own houſe, and would be in private conference together, which probably was about this matter; but if it were, this only confirms what *Woodburne* inſiſts on, that he was ſolicited and hired by *Coke* to do this fact; which, as I ſaid, will neither juſtify nor excuſe him; for no man is to obey the unlawful commands, or hearken to the illegal advices of any other perſon whatſoever.

As for Mr. *Coke*, that which he principally puts his defence upon is, that his intent was to kill and murder Mr. *Criſpe*, but not to maim him, or to ſlit his noſe, or to diſfigure him in ſo doing; and therefore, though in purſuance and execution of the attempt to murder Mr. *Criſpe*, they ſlit his noſe, or might thereby diſfigure him, yet that not being their intention, and deſign, he is to be acquitted on this indictment, wherein the intent of the party is one of the principal ingredients to make him guilty. This ſame defence will ſerve alſo for *Woodburne*, that they intended to murder, but not to maim; and if they did maim, it was with an intention to kill, and not to diſfigure. Now this indictment is, as I told you, founded on the 22d and 23d *Car.* II. c. 1. for that on purpoſe, of malice fore-thought, and by lying in wait, the priſoners did unlawfully and feloniouſly ſlit the noſe of *Edward Criſpe*, with intention in ſo doing to maim or diſfigure him. *Woodburne* is charged as the actor or principal agent, *Coke* as being preſent, aiding and abetting; which, in point of law,

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is the ſame, as to the guilt and conſcience, both being in law principals.

That this attempt on Mr. *Criſpe* was deſigned, malicious, and by lying in wait, the evidence is very ſtrong; there hath been alſo very ſtrong evidence given, that the noſe of Mr. *Criſpe* was ſlit by *Woodburne*, and that *Coke* was preſent on the ſame deſign with *Woodburne*.

But the thing chiefly inſiſted on is, that the ſlitting of Mr. *Criſpe*'s noſe was not with an intention in ſo doing to maim or diſfigure him; and if it were not with that intent, then the priſoners will not be guilty upon this indictment.

Now gentlemen, what the intent of theſe perſons was in ſlitting Mr. *Criſpe*'s noſe, you are to try; this is a matter of fact for your conſideration and determination: it is the ſame in other felonies, where the intent of the party makes the crime. Burglary is breaking open an houſe in the night-time, with an intent to commit a felony; though no felony be committed, yet if there was an intent to do it, it is burglary; which intent is to be tried by the jury. Larceny, or theft, is taking away another man's goods, with an intent to ſteal; if it were without ſuch an intent, it would only be a treſpaſs, and no larceny; but whether it were or were not with ſuch an intent, is a matter of fact to be inquired into and determined by the jury. Nay, the intent is ſo neceſſary in all felonies, that a perſon who hath no intent or deſign, as a madman, lunatic, infant, &c. cannot commit felony for that very reaſon; becauſe he cannot have any intent or deſign in his actions. So that in this caſe you are to try no other matter than what is tried in other felonies, viz. The intent of the party.

Now how is the intent of the party diſcovered in other caſes? By the facts themſelves, by the precedent, concomitant, and ſubſequent circumſtances of the facts, by the manner of doing, and the like.

There are ſome caſes where an unlawful or felonious intent to do one act, may be carried over to another act, done in proſecution thereof; and ſuch other act will be felony, becauſe done in proſecution of an unlawful or felonious intent: as, if a man ſhoots at a wild fowl, wherein no man hath any property, and by ſuch ſhooting happens to kill a man; this homicide is not felony, but only a miſadventure or chance-medley, becauſe it was an accident that happened in the doing of a lawful act: but if this man had ſhot at a tame fowl, wherein another had property, but not with intention to ſteal it, and by ſuch ſhoot-

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ing had accidentally killed a man, he would then have been guilty of manſlaughter, becauſe done in proſecution of an unlawful action, viz. committing a treſpaſs on another's property: but if he had had an intention of ſtealing this tame fowl, then ſuch accidental killing of a man would have been murder, becauſe done in proſecution of a felonious intent, viz. an intent to ſteal. So a man of malice intends to burn one houſe, in execution thereof he happens to burn another houſe; this is a malicious and felonious burning of this other houſe, becauſe ſprung out of a malicious and felonious intent. The like may be inſtanced where poiſon is intended to be given to one perſon, and another takes and eats it, and thereby dies. And other caſes there are of the like nature, where acts done in proſecution of felonious intents, participate of the nature of their original from whence they ſpring.

But now the indictment on this ſtatute is for a certain particular intent; for purpoſely, maliciouſly, and by lying in wait, ſlitting Mr. *Criſpe*'s noſe, with an intention in ſo doing to maim or diſfigure: and you are to conſider, whether the ingredients neceſſary to make this a felony within the ſtatute, have been proved to your ſatisfaction. The facts neceſſary to be proved on this indictment are, that on purpoſe, and of malice fore-thought, and by lying in wait, they unlawfully ſlit the noſe of Mr. *Criſpe*, with intention in ſo doing to maim or diſfigure. As to the fact of ſlitting the noſe, that is directly and poſitively ſworn: there can be no doubt but that it was an unlawful ſlitting. Then the next thing for your conſideration will be, whether this unlawful ſlitting was on purpoſe, of malice fore-thought, and by lying in wait. As to this, a great deal of evidence hath been given; and what paſſed before, and at the time of the fact, will guide you herein. And if on a review of the evidence, you ſhall be of opinion, that this unlawful ſlitting of the noſe was on purpoſe, of malice fore-thought, and by lying in wait; then the next queſtion will be, whether this was an intention to diſfigure? Facts do in ſome meaſure explain themſelves; and the circumſtances preceding and accompanying thoſe facts; and the manner of doing them, do many times more fully explain and declare the intent of the party. The priſoner Mr. *Coke*, (which defence goes both to him and *Woodburne*) inſiſts, that their intention was to murder, and not to maim; and that if they did maim or ſlit the noſe, it was with an intention to kill, and not with an intention to maim or diſfigure. On the other ſide, it is inſiſted on by the king's

counſel,

counſel, that though the ultimate intention might be to murder, yet there might be alſo an intention to maim and disfigure; and though the one did not take effect, yet the other might: an intention to kill, doth not exclude an intention to maim and disfigure. The inſtrument made uſe of in this attempt was a bill or hedging-hook, which in its own nature is proper for cutting and maiming; and where it doth cut or maim, doth neceſſarily, and by conſequence disfigure. The attempt intended on Mr. *Criſpe* was immediately to his perſon, to do him a perſonal injury. Beſides, the manner of doing and perpetrating this fact is proper to be conſidered; that it was done by violence, and in the dark, where the aſſailant could not well make any diſtinction of blows; but knocked and cut on any part of Mr. *Criſpe*'s body, where he could, till he had ſunk him down, and done to him whatever elſe he pleaſed. And if the intention was to murder, you are to conſider, whether the means made uſe of, in order to effect and accompliſh that murder, and the conſequences of thoſe means, were not in the intention and deſign of the party; and whether every blow and cut, and the conſequences thereof, were not intended, as well as the end for which it is alleged thoſe blows and cuts were given.

All theſe ſeveral things, which I have mentioned, are proper for your conſideration: you will add to them your own obſervations; and if, upon the whole, you are ſatisfied from the evidence, that *Woodburne* did on purpoſe, and of malice forethought, and by lying in wait, unlawfully ſlit the noſe of *Edward Criſpe*, with intention, in ſo doing, to maim or disfigure; and that *Arundel Coke* was felonioufly preſent at the commiſſion of this fact, and aiding and abetting therein; then you will find them Guilty: but if this hath not been proved to your ſatisfaction, then you are to acquit them, and find them Not Guilty.

Then the jury withdrew to conſider of their verdict, and in about half an hour returned again, with a verdict againſt them both, Guilty.

Mr. *Coke*. I deſire to know of your Lordſhip, whether the noſe can be ſaid to be ſlit within the meaning of this ſtatute, when the edge of it was not cut through?

Lord Chief Juſtice. It is true, the edge of the noſe was not ſlit, but the cut was athwart the noſe; which cut ſeparated the fleſh of the noſe, and cut it quite through into the noſtril: this I take to be a ſlitting of the noſe; and the ſurgeon ſwore the noſe was ſlit.

On

On the next day, viz. *March* 15, *Coke* and *Woodburne* were brought to the bar, and being aſked what they had to ſay why the Court ſhould not proceed to give judgment of death? *Woodburne* ſaid nothing.

Mr. *Coke*. Though your lordſhip did not think it proper yeſterday to aſſign me counſel, yet I hope your lordſhip will now give me leave to ſpeak for myſelf; eſpecially ſince I am the firſt unhappy inſtance of an indictment on this ſtatute; no indictment, as far as it appears by the law-books was ever yet founded on this ſtatute, and therefore ought to be very well weighed.

Lord Chief Juſtice. Call the king's counſel, that they may hear what is ſaid. (Then the king's counſel were ſent for, and being come:)

Lord Chief Juſtice. Mr. *Coke*, you may now go on with what you have to offer.

Mr. *Coke*. My lord, I was ſaying, that I am the firſt unhappy inſtance of an indictment upon this ſtatute; no indictment, as far as appears by the law-books, was ever yet founded on this ſtatute; and therefore it ought to be very well weighed, eſpecially in the firſt inſtance to which it appears to have been ever applied. It is a very penal ſtatute, and conſequently by the known rule of law not to be carried beyond the expreſs letter of it; conſequently no crime, of what nature or magnitude ſoever, can fall within the purview of it, but ſuch as is identically the ſame in every circumſtance with that deſcribed by the words of the ſtatute itſelf.

The crime deſcribed by the ſtatute is the unlawful cutting out, or diſabling the tongue, putting out an eye, ſlitting the noſe, cutting of a noſe or lip, or diſabling any limb or member, attended with theſe particular circumſtances:

1. On purpoſe and of malice fore-thought.

2. By lying in wait.

3. With intention in ſo doing to maim or diſfigure in any of the manners beforementioned in the ſtatute.

Theſe circumſtances muſt all concur to conſtitute that particular crime deſcribed by the ſtatute; and where any of them are wanting, of what magnitude ſoever the offence may be, it is not the offence which the ſtatute has ſpecified.

If the firſt circumſtance be wanting, no man can ſay that any offence, though attended with the other two, can fall within the ſtatute; this is ſufficiently plain of itſelf.

As to the ſecond; *A*. and *B*. of malice fore-thought, appoint and meet to fight a duel; *A*. in the rencounter runs *B*. into

into the eye, and puts it out; nobody has ever imagined this to be within the ſtatute, becauſe the circumſtance of lying in wait is here wanting.

As to the third; ſuppoſe *A.* lies in wait to rob *B. B.* reſiſts, and in the ſcuffle is wounded, as the ſtatute deſcribes, but gets off. This is a caſe which very frequently happens, yet no one ever thought it to be within the ſtatute, nor was any one ever indicted for this upon it: the only reaſon of which muſt be, becauſe the intention was to rob, and not to maim and diſfigure the perſon.

In my caſe, if it be taken upon the evidence of Mr. *Criſpe*, nothing more appears than the aſſault itſelf: if my confeſſion be read, the lying in wait, and the malice forethought will be proved; but then it will be likewiſe proved, that I had no other intention but to kill, and had no other part, but by giving orders to *Woodburne* for that purpoſe; and my confeſſion muſt be taken together.

Nor is it an objection to ſay, that the crime which is proved by the evidence is much worſe than that which is deſcribed by the ſtatute; for if it is worſe, then it cannot be the ſame. Even in caſes of crimes by the common law, if upon an indictment for a crime of an inferior nature, the evidence proves the fact attended with circumſtances which brings it within the deſcription of a crime of a ſuperior nature, the perſon indicted muſt be acquitted. At ſummer aſſizes at *Dorcheſter*, *anno* 1712, a woman was indicted before Mr. Juſtice *Eyre*, for the murder of another woman; upon this evidence it appeared, that the perſon murdered was her miſtreſs, which made the crime petty treaſon. The judge directed this matter to be ſpecially found, and upon conference with all the judges it was held, ſhe ought to be acquitted upon this indictment, as ſhe accordingly was; and was afterwards indicted for petty treaſon, and convicted and executed thereupon.

Where a new offence has been created by ſtatute, or an old one made more penal, the utmoſt ſtrictneſs has always been uſed to comply with the letter of the ſtatute, whatever inconveniences might reſult from ſuch a reſtraint.

As for example:

By the ſtatute of the 39 *Eliz. cap.* 14. Clergy is taken away from any perſon or perſons who ſhall be convicted of taking any money, goods or chattels out of any dwelling-houſe, &c. in the day-time, to the value of five ſhillings. One *Evans* and one *Finch* were indicted on this ſtatute, 1 *Croke* 473. *Evans* and *Finch*'s caſe: the caſe was thus upon the

the evidence, That *Evans* by a ladder climbed to the upper window of one *Audley*'s houſe, and took out thereof forty pounds; and that *Finch* ſtood upon the ladder in view of *Evans*, and ſaw *Evans* in the chamber, and was aſſiſting and helping to the committing of the robbery, and took part of the money: upon a ſpecial verdict it was adjudged, that becauſe *Finch* did not actually enter the chamber, and take the money, though what he did amounted to a taking by conſtruction of law, and was ſuch a taking as made him a felon; yet the very letter of all penal ſtatutes muſt be purſued, and therefore, he, *id eſt*, *Finch*, had his clergy, and *Evans* was hanged.

Numerous caſes might be put of this kind of nicety in the conſtruction of penal ſtatutes.

To mention but one more: by the ſtatute of 1 *Edw.* VI. *cap.* 12. Clergy is taken away from ſuch perſons as ſhall be convicted for the felonious ſtealing of horſes, geldings or mares.—So ſcrupulouſly did the judges adhere to the letter of this law, that there was forced to be another ſtatute made, viz. 2 and 3 *Edw.* VI. *cap.* 33, to enact, That a perſon convicted for felonioufly ſtealing one horſe, ſhould be ouſted of his clergy in the ſame manner as if he had ſtole two.

Nor is it in this caſe enough to ſay, the jury are judges of all this: for as the evidence now appears, and is admitted, it is matter of law, how far this evidence thus admitted on all hands is ſufficient to ſupport this indictment. If it were in a civil caſe, the party might demur to the evidence. But if he is not allowed that liberty in criminal caſes, it is upon the common notion, that the judges are the priſoner's counſel; and are obliged to determine all the matters in law ariſing upon the evidence, as much as if the perſons had demurred to that evidence.

And, as in this caſe, the priſoner admits the evidence given to be true, and inſiſts upon it, that it doth not ſupport the indictment; and therefore has a right to have the opinion of the judges thereupon, as much as if the evidence were ſtated at length upon the record (as it muſt be in the caſe of a demurrer to evidence) and nothing ought to be left to the jury, but under the ju ges' directions as to point of law.

In all theſe caſes therefore, my Lord, it has been uſual to allow the fact to be ſpecially found: which gives the priſoner the advantage he might have had by the demurrer to the evidence.

Serjeant

Serjeant *Selby*. My Lord, I do agree with the priſoner at the bar, that this is a very penal ſtatute, and that theſe facts muſt be made out to bring his caſe within the letter of the act, viz. An intention or purpoſe, of malice, forethought, to maim or disfigure in ſuch a manner as the ſtatute deſcribes; a lying in wait for that purpoſe; a maiming, or disfiguring accordingly; and an abetting and being privy to theſe facts: theſe are all facts which the jury only could determine, either by poſitive, preſumptive, or circumſtantial evidence; for no man's thoughts or intentions can be otherwiſe proved than by his actions. My Lord Chief Juſtice hath left the whole evidence of theſe facts to the jury, who by their verdict have found all theſe facts as laid in the indictment, againſt which nobody can now open his mouth: we apprehend therefore that no matter of law hath ariſen, and that what hath been inſiſted on by the priſoner, is beſide his caſe, and needs no anſwer.

Serjeant *Branthwait*. My Lord, the jury have found him guilty. I apprehend nothing can properly be alledged now by Mr. *Coke*, that is contrary to the verdict: if there is any fault in the indictment, we are ready to anſwer any objections he ſhall make againſt it. That he does not pretend to. What is now offered by him is againſt the verdict, and contrary to what is found by the jury. I beg your lordſhip's leave to give an anſwer to the objections he is pleaſed to make againſt the verdict, however improperly and out of time made, for the ſatisfaction of himſelf, and of the perſons here preſent. I agree a penal act ſhall not be conſtrued by equity, or carried further than the words or letter of the act, as the caſes mentioned by him to prove; but affirm, that this preſent caſe is within the words and meaning of the act: for though the ultimate intent of Mr. *Coke* might be to murder Mr. *Criſpe* (as by him is alledged in excuſe of himſelf) all the means made uſe of to effect that intent were alſo on purpoſe, and ſuch blows could not be given by an inſtrument, without an intent to maim and disfigure. They were given by one lying in wait on purpoſe; and the fact and manner of doing the ſame ſufficiently prove, and are a certain and neceſſary indication of the intent. The defendants might have an intent to cut off, or ſlit the noſe; put out an eye, or diſmember; and an intent alſo to kill and deſtroy; one intent did take effect, the other not. The defendants ought not to anſwer for what was not done, but ought to anſwer for what was done, which was the ſli ting of Mr. *Criſpe*'s noſe, on purpoſe to maim and disfigure

him, by one lying in wait; which is all that is required by the act.

As to the objection; that if *A.* and *B.* go together to fight a duel, if *A.* ſlit the noſe of *B.* this is not within the act; the reaſon is, becauſe there is no lying in wait.

As to the caſe of *A.* lying in wait to rob *B.* I with great ſubmiſſion do ſay, that if *A.* lie in wait to rob *B.* and to effect that purpoſe with the greater eaſe, *A.* on purpoſe diſmembers *B.* or puts out his eyes, or does any other fact prohibited by the act; though *A.* be hindered from robbing *B.* he is within the act of parliament; for the intent and purpoſe to rob, will be no excuſe to one that ſhall commit the facts prohibited by the act.

As to the caſe of *Evans* and *Finch*, *Cr. Car.* 473. on 39 *Eliz.* which takes away the clergy from him that enters and ſteals: *Finch* was not within the ſtatute, and had his clergy; for the expreſs words of the ſtatute take away the clergy from him that enters the houſe, which *Finch* did not. As to the indictment of a ſervant for murder, in killing her miſtreſs; it is plain, that it is a crime of a higher degree than murder, it is an offence of another ſpecies, it is petty-treaſon and not murder.

The ſame anſwer may be given to the other caſes mentioned, where the words of an act of parliament are expreſs. No caſe ſhall be conſtrued within a penal act, but what is within the words: but as to the preſent caſe, the jury have found every fact that the act of parliament requires, that an unlawful aſſault was made on Mr. *Criſpe* by the priſoners; that his noſe was ſlit on purpoſe to maim and diſfigure him by lying in wait. And all theſe facts were proved by plain, clear, and I believe convincing evidence, to every perſon that heard the trial. I am ſure the priſoners cannot complain of any hardſhip done them; the proſecution was carried on for the ſake of juſtice, for the ſafety of his majeſty's ſubjects. This being the firſt inſtance of a crime ſo heinous, cruel, barbarous and inhuman, that has been committed ſince the making the act of parliament, it is hoped by this proſecution a ſecond will never be committed; for which reaſon, I pray your lordſhip's judgment for the king againſt the priſoners.

Mr. *Raby*. My Lord, I did expect at this time I ſhould have heard, from this unhappy gentleman, ſomething in arreſt of judgment; ſomething to ſhew that this indictment and record, now before your lordſhip in judgment, had been inſufficient, and ſuch as your lordſhip could not have proceeded upon to give judgment againſt the priſoners: but

I do not perceive any thing has been objected to this indictment or record; and therefore ſince nothing appears, or is objected, they muſt be taken to be ſufficient, and ſuch as your lordſhip ought by law to give judgment upon againſt the priſoners now at the bar.

But this gentleman has been pleaſed to take notice of the act of parliament on which this proſecution is founded: he has alſo made ſome mention of the facts which have been given in evidence againſt him; and cited ſome caſes (as I apprehend) to ſhew, that penal ſtatutes, and criminal acts of parliament, ought not in conſtruction to be carried beyond the letter and words of the act. This which he has offered (as I take it) is now meant to ſhew (or at leaſt that he apprehends) that from the evidence given, it has not fully appeared he is guilty of the offence with which he ſtands charged, within the ſtrict words and meaning of this act of parliament: and for this end he has been pleaſed to make ſome obſervations from the words of the ſtatute, what things he apprehends to be neceſſary to bring him within the compaſs of this act, viz. That ſuch wound or maiming, as is deſcribed by the ſtatute, ought to be,

1. On purpoſe, and of malice fore-thought.
2. By lying in wait.
3. With an intention to disfigure.

All theſe have been already admitted to him; and he will ſee every one of theſe circumſtances not only taken notice of by us in our obſervations upon the evidence, but alſo more fully by your lordſhip, before the jury gave their verdict.

But with what intent this fact was done, whether of malice fore-thought, by lying in wait, and with intent to diſfigure, are circumſtances only to be collected from the evidence and the facts themſelves; of which neither we nor the Court can determine, but can only be enquired of, and determined by the jury; and therefore, though it would be a full anſwer to what is now objected, to ſay, that the jury have conſidered the evidence, have determined upon it, and found you guilty of the indictment, with all thoſe circumſtances which the priſoner objects are neceſſary to bring the offence within the ſtatute; though this, I ſay, might be anſwer; yet for the juſtice of this proceeding, and to ſatisfy the priſoner in his own objections, and that they ſhould not paſs unanſwered, your lordſhip will permit me to take notice of the caſes cited, and alſo to recollect

the evidence, ſo far as the priſoner hath made it neceſſary to repeat it.

I confeſs, it is with concern I mention it again; for I would not do any thing which might add to the weight of thoſe afflictions which this unhappy gentleman is under, had not he himſelf made it neceſſary to take farther notice of it.

As to the caſes cited, only two of them which he mentions are cited to be adjudged; that at *Dorcheſter* by Mr. Juſtice *Eyre*, that a woman was indicted for murder, and upon evidence it appeared to be a different offence, viz. petit-treaſon, for ſhe had killed her miſtreſs; and that thereupon Mr. Juſtice *Eyre* cauſed her to be indicted for petit-treaſon, and ſhe was convicted. Certainly, my Lord, that judgment was right and very juſt; for when it appeared upon evidence that ſhe was guilty of a diſtinct and different offence than that of which ſhe ſtood indicted, could any thing be more juſt, than to cauſe her to be indicted for that offence, of which, upon the nature of the evidence, ſhe appeared to be guilty? The ſecond caſe cited of *Evans* and *Finch* (which is reported in *Cro. Car.*) is no more than this: *Evans* went up a ladder, opened a chamber window into the *Temple*, went in and robbed the chamber in the day-time: *Finch* held the ladder, and ſtood at the foot of it when *Evans* entered: *Evans* was hanged, *Finch* had his clergy, and was only burnt in the hand; and with great reaſon: for the ſtatute, 39 *Eliz.* which takes away clergy, takes the clergy only from him that enters: and therefore to have taken the clergy from *Finch* who did not enter, had been unjuſt and unreaſonable. And as to what is mentioned of the ſtatute 2 and 3 *Edw.* VI. *cap.* 33. made in explanation of the ſtatute which took clergy from him who ſtole horſes, and to take clergy from him who ſtole only one horſe, there is ſuch an act of parliament; but this act and the caſes cited, only ſhew that regard has always been had, not to extend penal ſtatutes beyond the words of them. But before theſe caſes were mentioned (and indeed had they never been cited) this rule of conſtruction had been allowed to the priſoner; for all the particulars now inſiſted on by the priſoner were before taken notice of by the Court, as circumſtances neceſſary to make out the offence againſt the priſoner; nor has one of thoſe circumſtances paſſed without obſervation: but the Court did with great juſtice before declare thoſe circumſtances to be neceſſary ingredients to prove this offence. And as to the other caſes, they are to the ſame purpoſe, and not cited as caſes adjudged;

and therefore I need not take farther notice of them. But certainly no inferences can be drawn from the caſes cited, or any the leaſt colour to ſay, thoſe caſes prove that the priſoner is not guilty of the offence he ſtands charged with, and of which he is convicted.

I am ſorry he has given this occaſion to mention again the fact which has been proved, from whence it appears that the jury have given an impartial and juſt verdict.

It cannot be forgot, that this was conſulted and premeditated for three years and more before it was put in execution; and therefore it was certainly purpoſed and of malice fore-thought; alſo that it was by lying in wait. Certainly this unhappy gentleman cannot have forgot the ſignal he gave: and to what purpoſe was that ſignal, if none was in waiting to hear it? And that this was with an intent to diſfigure, muſt be ſubmitted upon the fact and the evidence. A man uſes a weapon fit to maim and to diſfigure, he cuts another on the face and does diſfigure him; ſhall he afterwards be at liberty to ſay, it was not his intent ſo to do? How dangerous that would be, is obvious to every one; this act would then be eaſily eluded, if it ſhould be ſufficient, if it ſhould avail an offender, who has maimed and diſfigured another, to ſay, Prove that I intended it: it would be eaſy then to be out of the reach of this act of parliament; indeed, if that prevailed, none would be within it, it would be an eaſy repeal of this law. It is objected, his intent was to kill: he that intends the end, certainly intends the means, eſpecially thoſe means which he uſes; and the means uſed were cutting Mr. *Criſpe* on the face, and diſfiguring him; and the weapon is ſuch, that by cutting him on the face with that weapon, could leſs be intended or expected? And if the intent does not appear from this fact, ſure it never can from any: the intent of a man's mind cannot appear but from the act which proceeds from the mind.

It is ſaid, this is the firſt indictment on this ſtatute: I believe there hath not been many; for this is an offence ſo barbarous, that I muſt agree it is ſuch as ſeldom happens, and that by the general laws of our country, there was not a puniſhment provided equal to this offence: for our laws, (as the laws of moſt nations alſo do) provide againſt offences which moſt frequently happen: but this is an attempt ſo barbarous, that it was ſcarce imagined any man could be ſo baſe and wicked as to attempt any thing like it, until it happened in the caſe of Sir *John Coventry*; and then ſuch an abhorrence was ſhewn by the parliament, that this law

law was made to puniſh it, and to prevent the like for the future: and as this is the like offence, it ought in juſtice to have the like puniſhment.

I ſhall add no more, but pray your lordſhip's judgment.

Mr. *Lee*. My Lord, the obſervations made at the bar being after the verdict, and therefore out of time, I ſhall not trouble your lordſhip with a repetition of the facts that have been proved, further than the priſoner has made it neceſſary for me to mention ſome particulars, in order to make the anſwers to what he hath inſiſted on the more clear and plain.

I believe it has been truly ſaid by the priſoner, that the preſent proſecution is the firſt inſtance of any proceedings on this ſtatute, and I hope it will be the laſt; becauſe it is to be hoped there never will be found any other perſon ſo wicked, as to give occaſion for a proſecution on this ſtatute.

I believe likewiſe, that the true deſign of making this ſtatute was to ſubject perſons to death, who intended to maim only, where the maiming was in ſuch manner as is mentioned in the ſtatute; but I cannot think that it does from thence follow, that a perſon who intends to murder, and only maims, is not within this ſtatute; for though it ſhould be taken that there was an intention to murder, yet from the fact done, from the manner of doing it, and from the weapon made uſe of, it ſeems apparent that the priſoner intended to maim; and the jury have now found that he did ſo intend.

As to the caſes which the priſoner has cited, I beg leave to conſider each of them, and offer ſuch anſwers to them as now occur.

The firſt caſe he has been pleaſed to cite, is thus put:

A. and *B.* of malice fore-thought, appoint to meet and fight a duel, *A.* in the rencounter runs *B.* into the eye, and puts it out: the priſoner ſays, ſuch a caſe would not be within this ſtatute.

I agree it would not, becauſe this caſe has not the circumſtances which the ſtatute requires; for in the caſe thus put there is no lying in wait, which is a circumſtance required by the ſtatute.

It is ſaid, that if *A.* lies in wait to rob *B.* *B.* reſiſts, and in the ſcuffle is maimed in the manner deſcribed by the ſtatute, that ſuch maiming would not be puniſhable by this ſtatute; but I do not obſerve any caſe is cited to prove this aſſertion: and I am, with ſubmiſſion to your lordſhip, inclined to think, that if there are a lying in wait

wait, with malice fore-thought, with intent to rob, and in profecuting this intent the robbers ſhould aſſault and maim in the manner deſcribed by the ſtatute, that ſuch maiming would be within this ſtatute.

It is ſaid, that though the intent to murder makes the offence worſe than if the intent had been only to maim, yet ſuch intent proves it not to be the ſame offence which is mentioned in the ſtatute: and if a man be indicted of an offence of an inferior nature, and upon the evidence it appears that he is guilty of an offence of a ſuperior nature, the perſon indicted muſt be acquitted; and to prove this, a caſe is cited, which is ſaid to have been before Mr. Juſtice *Eyre* at *Dorcheſter* aſſizes. The caſe, as put, is this: a woman is indicted for the murder of another woman, on the evidence it appeared, that the perſon murdered was her miſtreſs, which made the crime petty-treaſon: this was found ſpecially, and upon conference with the judges, they were of opinion, that the woman ought to be acquitted upon this indictment.

Admitting this caſe to have been adjudged, I apprehend it does not affect the preſent caſe.

The law has diſtinguiſhed crimes under different denominations; and as offences are ranked under different ſpecies, ſo the indictment muſt be ſuited to that ſort of crime whereof the party is guilty: and therefore proving a perſon guilty of a fact, known in the law by the name of petty-treaſon, does not prove him guilty of an indictment for murder; murder being an offence which the law has diſtinguiſhed from petty-treaſon, and to which it has aſſigned a different puniſhment.

But in the preſent caſe, that offence which is charged in the indictment, is proved in every circumſtance, and the facts proved do conſtitute that crime which is made felony without clergy by the ſtatute. The ſtatute requires lying in wait, it requires malice fore-thought, it requires ſlitting the noſe, &c. with intent to maim, &c. The indictment charges theſe facts, the witneſſes have proved theſe facts to the ſatisfaction of a jury, which have found the defendant guilty of the charge as laid.

The priſoner ſays farther, that this is a very penal ſtatute, and that penal ſtatutes are always taken with the utmoſt ſtrictneſs; and to prove this, cites a caſe adjudged on the ſtatute 39 *Eliz.* by which ſtatute clergy is taken away from any perſon or perſons, who ſhall be convicted of taking away money, &c. in any dwelling houſe, &c. in the day-time, to the value of five ſhillings: and to prove the ſame matter, an inſtance

inſtance is likewiſe put of the conſtruction of the ſtatute, 1 *Eliz. cap.* 12. which takes away clergy from ſuch perſons as ſhall be convicted of feloniouſly ſtealing horſes, &c. The caſe in the ſtatute 39 *Eliz.* in the caſe of *Evans* and *Finch*, *Cro. Car.* 473. in which caſe *Finch* had his clergy, becauſe he did not actually enter the chamber and take the money. The conſtruction on *Edw.* VI. was, that clergy was not taken away from a perſon who feloniouſly ſtole one horſe.

But I apprehend neither of theſe caſes come up to the caſe now before your lordſhip. As to the caſe of *Evans* and *Finch*, which was a caſe upon the ſtatute 39 *Eliz.* By that ſtatute a perſon is ouſted of clergy who takes away money to the value of five ſhillings in any dwelling-houſe, &c. *Finch* did not enter into the houſe, for he only ſtood on the ladder; and therefore he was not within the words of that ſtatute, which ſpoke only of perſons who took away goods in an houſe, &c.

As to the conſtruction upon the ſtatute 1 *Edw.* VI. it is plain that the felonious ſtealing one horſe could not be within act of parliament which took away clergy only from ſuch perſons as feloniouſly ſtole horſes. The reaſon therefore of theſe caſes was, that the facts proved did not bring the perſons accuſed within the words of the ſtatute.

But it is not ſo in the caſe now before your lordſhip; for the priſoner is found guilty of a fact, which is within the words of the ſtatute upon which he is indicted; and every circumſtance required to make him guilty of the felony mentioned in the ſtatute has been very fully proved.

My Lord, I am very ſenſible that the objections taken at the bar being after verdict, did not require theſe particular anſwers: but this being a caſe wherein life is concerned, I hope the impropriety will be excuſed.

Lord Chief Juſtice. I do agree with the priſoner, that this is a penal law, and not to be extended by equity: that he that is guilty within this ſtatute, muſt be guilty of all the circumſtances within it; and if any one of the circumſtances preſcribed by the ſtatute be wanting, he is not guilty. And therefore in all thoſe caſes put by you, if any one of the circumſtances preſcribed by the ſtatute be wanting in any one of them, ſuch caſe is out of the ſtatute. But whether all the circumſtances required by the ſtatute did not concur in your caſe, was a matter of fact, which the jury, who are the proper judges, have tried; and on ſuch trial they have found

found them all to concur. You ſeem to argue upon a ſuppoſition of this fact to be otherwiſe than the jury have found it. The jury have found you guilty of all the circumſtances within the ſtatute. There was no matter of law in this caſe, but matter of fact; whether on purpoſe, and of malice fore-thought, and by lying in wait, the noſe of Mr. *Criſpe* was not ſlit, with intention, in ſo doing, to maim or diſfigure; and whether you were not feloniouſly preſent, aiding and abetting. The jury had the whole evidence before them; they conſidered of the whole matter, of the preparation and lying in wait to do the fact, of the fact itſelf, of the means and inſtruments made uſe of to do it, of the manner of doing it, and of all the other circumſtances and particulars relating to the fact: and on the whole, after they had withdrawn, and conſidered amongſt themſelves for ſome time, they have found you guilty within the terms and circumſtances of the ſtatute; ſo that though all the caſes put by you ſhould be very good law, yet they do not any wiſe affect yours, becauſe you are actually found guilty of the crime itſelf: have you therefore any thing to ſay againſt the indictment itſelf?

Mr. *Coke*. No, my Lord: I hope I have one glimpſe more from the king's moſt gracious pardon, that was publiſhed in the *Gazette*.

Lord Chief Juſtice. If you offer any pardon by act of parliament, or under the great ſeal, I muſt take notice of it, and allow it to you; but if you mean only a promiſe of a pardon in the *Gazette*, or any other public advertiſement, you muſt apply for that in another place; this doth not belong to me.

Mr. *Coke*. I hope that I ſhall have the benefit of the pardon that was promiſed, and that his majeſty will be graciouſly pleaſed to grant it me.

Lord Chief Juſtice. If you have a right to it, you need not doubt but you will have it: his majeſty is ſo juſt, that he will make good whatſoever he hath promiſed; but for this, your application muſt be immediately to his majeſty.

Mr. *Coke*. I beg of your lordſhip that you will give me time, that I may not be hurried out of the world preſently.

Lord Chief Juſtice. I ſhall conſider of it, and give you a convenient time.

Cl. of Arr. Cryer, make an *O Yes*.

Cryer.

Cryer. Our Sovereign Lord the King doth ſtraitly charge and command all manner of perſons to keep ſilence, whilſt judgment is giving upon the priſoners convicted, upon pain of impriſonment.

Lord Chief Juſtice. You that are the priſoners at the bar, you have been indicted and convicted of very great and heinous offences; I am very ſorry that you have been the occaſion of bringing yourſelves to unfortunate ends, and that there is this melancholy neceſſity on me to pronounce the ſentence of death upon you: but on fair trials the jury have found you guilty, and by the law you have forfeited your lives.

Mr. *Coke.* My Lord, I am aſhamed of myſelf: I did not expect to appear at this time in this place, where I have appeared in another manner.

Lord Chief Juſtice. I am ſure, Mr. *Coke*, you ought ſeriouſly to reflect on your paſt life: you cannot but own that you have been a great ſinner; you have had malice in your heart againſt this gentleman above three years.

Mr. *Coke.* Indeed, my Lord, I know nothing of it.

Lord Chief Juſtice. Moon hath ſworn, that three years, or three years and a half ago, you ſent to him, and propoſed to him the knocking Mr. *Criſpe* on the head.

Mr. *Coke.* I do declare it my Lord, as I ſhall anſwer it at the great day, I never ſpoke to *Moon* about any ſuch thing.

Lord Chief Juſtice. Suppoſing what *Moon* hath ſaid to be too much, yet the crimes you own and cannot deny are exceeding heinous. You own that you invited your brother to ſup at your houſe, on purpoſe that you might have an opportunity of murdering him. This is ſuch a crime as ſhocks human nature: the bare mentioning of it is frightful and terrible. The deeper therefore your crime is, the deeper your repentance ought to be. You have need to humble yourſelves before Almighty God. Beſides the judgment of the law, there is alſo his judgment-ſeat, before which you muſt likewiſe appear: there all things are naked and bare, without colour or diſguiſe; every man muſt there appear, and receive according to the truth of his actions, as they were good or bad. How far it may pleaſe God to extend his mercy to you, I know not; he is infinite in mercy as well as in every other perfection: and this we are ſure, that he never denies to any who are prepared to receive it. Endeavour therefore to reconcile yourſelves to him; improve with diligence the little time that may be allotted you: ſend

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for proper perſons who may adviſe and aſſiſt you: for as to the judgment of the law which is now to be pronounced upon you all, it is this:

"That you, and each of you, go from hence to the place from whence you came, and from thence to the place of execution, where you ſhall be ſeverally hanged by the neck till you be ſeverally and reſpectively dead; and the Lord have mercy upon your ſouls."

Then the keeper carried away the priſoners to the gaol to be reſerved till their execution. And on *Saturday* the 31ſt of *March*, 1722, they were executed at *Bury*, *St. Edmond's*. *State Trials*, Vol. VI. p. 212. 1721.

A huſband cutting his wife's throat quite acroſs, while they were in bed, is not a maiming, or lying in wait, within the 22 and 23 *Car. c.* 1.

At the *Old Bailey*, *July* ſeſſion 1763, *William Lee* was indicted on the Coventry Act, 22 and 23 *Car.* II. *c.* 1. before Lord Chief Baron *Parker*, preſent Mr. Juſtice *Bathurſt* and Mr. Juſtice *Wilmot*, for that he, contriving and intending *Agnes* his wife to maim and diſfigure, on purpoſe and of malice afore-thought, by lying in wait, did make an aſſault with a certain razor, and the neck of the ſaid *Agnes* did cut, &c. with intent to maim and diſfigure.

The facts were, that the priſoner returned home one night, after his wife and two children were a-bed and aſleep, and cut his wife's throat with an old razor which he had concealed in his ſtocking, making a wound about three inches in length quite acroſs her neck; but providentially it was not mortal.

The words of the act of parliament are, "That if any perſon ſhall on purpoſe, and of malice fore-thought, and by lying in wait, unlawfully cut out, or diſable the tongue, put out an eye, ſlit the noſe, cut off a noſe or lip, or cut off or diſable any limb or member of any ſubject of his majeſty, with intention in ſo doing to maim and diſfigure, that then the perſon or perſons ſo offending ſhall ſuffer death without clergy."

The priſoner's counſel ſubmitted to the Court, that the evidence did not prove any offence within the ſtatute.

The Court were of the ſame opinion; and the priſoner was accordingly acquitted. *Leach*, Caſe 26.

At the *Old Bailey*, in *July* ſeſſion, 1765, *Barney Carroll* was indicted before Lord Chief Baron *Parker*, on the 22 and 23 *Car.*

Car. II. *c.* 1. *ſ.* 7. for that "he did on purpoſe, and of malice fore-thought, and by lying in wait, feloniouſly and unlawfully make an aſſault upon *Cranley Thomas Kirby*, Eſq. with intention to maim and diſfigure him; and with a certain knife did on purpoſe, and of his malice fore-thought, and by lying in wait, unlawfully and feloniouſly ſlit the noſe of the ſaid *Cranley Thomas Kirby*, with intention in ſo doing to maim and diſfigure him. And that *William King*, at the time of the committing of the ſaid felony, was preſent, counſelling, aiding and abetting the ſaid *Barney Carroll* to commit the felony aforeſaid."

The proſecutor had apprehended a young pickpocket, near *Somerſet-houſe* in the *Strand*. Upon his threatening to take him before a magiſtrate, the priſoner *Carroll*, who appeared to have been lurking under the ſide of the *New Church*, immediately came up and followed the proſecutor while he was conducting the boy towards *Temple-bar*, walking ſometimes before, and ſometimes behind them, until they came to the top of *Arundel-ſtreet*, when he ſtruck the proſecutor a violent blow acroſs the noſe and eyes with a razor-bladed knife, ſaying, "Damn you, ſir, let the boy go." It was alſo proved by an accomplice that four of them had that evening gone out to pick pockets, under an agreement to ſtrike or ſtab, or cut the noſe and eyes of any perſon who moleſted them. The wound bled profuſely; and upon examination it appeared that the two great blood-veſſels on Mr. *Kirby*'s forehead were divided; that there was a large tranſverſe wound acroſs the noſe, ſo wide open that the bone was viſible; that it began from the right, and went acroſs the eye-lid, and acroſs the noſe; that the two muſcles of the eye were cut through; that it proceeded to the left eye-lid, and terminated at the temple; and that a nerve was cut.

It alſo appeared upon the teſtimony of ſeveral ſurgeons, that in *Wiſeman*, and many other old authors who have written on ſurgery, ſuch wounds are called *ſlits*, but that a "*ſlit*" is not a word of modern uſe in ſurgery. The word *ſlit* is underſtood as ſynonymous to the word *cut*; but the idea which was formerly conveyed by the word *ſlit*, is now expreſſed, in ſpeaking technically, by the word *divided*.

The jury found the priſoners guilty. But it was queſtioned, Whether ſuch *a cut* was a *ſlitting* within the letter of the act, the wound not having perforated to the noſtril?

It was accordingly referred to the conſideration of the judges; and they being of opinion, that the offence deſcribed in

in the indictment was properly proved, and the conviction legal, the prisoners were executed on the 31st of *July* 1765, pursuant to their sentence. *Leach*, Case 30.

On an indictment of *Mayhem*, the malice, and lying in wait, must be expressly proved.

At the *Old Bailey* in *February* session, 1778, *Thomas Tickner* and *Thomas Adams* were indicted on the statute 22 and 23 *Car.* II. *c.* 1. commonly called the Coventry Act; *Thomas Tickner*, for making an assault on *William Jacob* with a bill hook, and slitting his nose, with intention in so doing to maim and disfigure the said *William*; and *Thomas Adams*, for being present, aiding and abetting in the said felony.

The prosecutor was servant to a Mr. *Cole*, of *Twickenham*, within about a quarter of a mile of whose house the prisoner lived. About twelve o'clock at night, on the 16th of *January* 1778, the prosecutor discovered the prisoners in a field belonging to his master, where *Tickner* was pulling up turnips. The prosecutor went up to *Tickner*, and spoke to him; but instead of making any reply, *Tickner* immediately struck him on the nose with a sharp instrument fixed into a stick of wood, and hanging loose, something like a flail. The blow knocked him to the ground, and he received several blows after he was down, which rendered him senseless for some time. He was carried to St. *George's Hospital*, and upon examination a small superficial wound was found upon the right side of his nose; a very large wound upon his neck, immediately under the lower jaw; a cut upon his hand; a small incision on the right brow: and eight wounds on the top of his head. The cut upon the nose had divided the exteguments of the nose in an oblique direction; but did not go through the bones of the nostril. There is very little covering to the bones of the nose, except the skin; and the cut went to the bone, but did not penetrate into the nostril. It was rather a cut or a scratch than a slit; but it was sufficient to leave a mark visible for a long time.

The evidence did not sufficiently affect the prisoner *Adams* to put him him upon his defence; but Mr. Justice *Gould* (present Mr. Justice *Ashhurst*, and Mr. Baron *Perryn*) told the jury, that he thought the evidence against *Thomas Tickner*, if they believed it to be true, sufficient in law to convict him of the charge in the indictment; for that he conceived it was not necessary that either the malice forethought or the lying in wait should be expressly proved to be

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on purpoſe to maim or disfigure. The priſoner was engaged in a criminal matter; prepared with a weapon to defend himſelf againſt all oppoſers; and being thus ready to ſupport himſelf in his unlawful deſign of ſtealing the turnips, he is anſwerable for the conſequences which happened in the proſecution of his illegal act. As to the ſlitting of the noſe, the learned judge ſaid, it had been adjudged in the caſe of Mr. *Kirby*, that a ſeparating of the fleſh was ſufficient to bring the offender within the meaning of the act of parliament, and that in the preſent caſe the cut had reached the bone.

The jury found the priſoner guilty; but on his receiving judgment, Mr. Serjeant *Glynn*, Recorder, ordered the execution of the ſentence to he reſpited, until the opinion of the twelve judges could be procured, Whether this conviction was proper within the meaning of the ſtatute, the words of which are, "That if any perſon ſhall on purpoſe, and of malice afore-thought and by lying in wait, unlawfully cut out or diſable the tongue, put out an eye, ſlit the noſe, cut off a noſe or lip, or cut off or diſable any limb or member, of any ſubject of his majeſty, with intention in ſo doing to maim or disfigure, in any the matters above-mentioned, ſuch his majeſty's ſubject; the perſon ſo offending, his counſellors, aiders, and abettors, knowing of and privy to the offence as aforeſaid, ſhall be felons, and ſuffer death without the benefit of clergy."

The judges were of opinion, That the conviction was wrong; and that this did not amount to a ſufficient evidence of lying in wait.

In *April* ſeſſion, 1783, *John Mills* was tried upon this ſtatute before Lord Chief Baron *Eyre*, for maiming on purpoſe, and of malice afore-thought, and by lying in wait, one *Thomas Braſier*.—The Court ſaid, a perſon who intends to do this kind of miſchief to another, and by deliberately watching an opportunity, carries that intention into execution, may be ſaid to lie in wait on purpoſe. It is not neceſſary that a man ſhould plant himſelf in any particular concealment, and effect the miſchief by ruſhing from his lurking place, to bring the offence within the meaning of the ſtatute. If, having formed an intention to maim, he comes unawares behind the perſon he intends to maim, and takes a convenient opportunity of deliberately doing the injury, it is lying in wait, although he does not take any particular length of time, or appear to uſe any extraordinary degree of preparation to perpetrate the miſchief. *Leach*, Caſe 90.

THREATENING

THREATENING LETTERS.

BY ſtatute 9 *Geo.* I. *c.* 22. *ſ.* 3. it is enacted, "That if any perſon or perſons ſhall knowingly ſend any letter, without any name ſubſcribed thereto; or ſigned with a fictitious name, demanding money, veniſon, or other valuable thing: or ſhall forcibly reſcue any perſon being lawfully in cuſtody of any officer or other perſon for the offences aforeſaid: or ſhall by gift, or promiſe of money or other reward, procure another to join him or them in any ſuch unlawful act, ſuch offender ſhall ſuffer death without benefit of clergy."

Sect. 4. And it is enacted by 27 *Geo.* II. *c.* 15, "That if any perſon or perſons ſhall knowingly ſend any letter without any name ſubſcribed thereto, or ſigned with a fictitious name or names, letter or letters, threatening to kill or murder any of his majeſty's ſubjects, or to burn their houſes, outhouſes, barns, ſtacks of corn or grain, hay or ſtraw, though no money or veniſon, or other valuable thing ſhall be demanded, in or by ſuch letter or letters, or ſhall forcibly reſcue any perſon in lawful cuſtody for the ſame, ſuch offender ſhall ſuffer death without benefit of clergy."

Sect. 5. And it is further enacted by 30 *Geo.* II. *c.* 24. "That all perſons who ſhall knowingly ſend or deliver any letter or writing, with or without a name or names ſubſcribed thereto, or ſigned with a fictitious name or names, letter or letters, threatening to accuſe any perſon of any crime puniſhable by the law with death, tranſportation, or pillory, or any other infamous puniſhment, with a view or intent to extort or gain money, goods, wares, or merchandizes, from the perſon or perſons ſo threatened to be accuſed, ſhall on conviction be put in the pillory, publicly whipped, or fined and impriſoned, or tranſported, not exceeding the ſpace of ſeven years, in the diſcretion of the court."

On the above ſtatute of 9 *Geo.* I. *William Barnard* was tried for ſending a letter in a fictitious name to *Charles* Duke of *Marlborough*, demanding a genteel ſupport for life.

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The charge was opened by Serjeant *Davy* as follows:

May it pleaſe your lordſhips, and you gentlemen of the jury;

I am council in this cauſe for the proſecution againſt the priſoner at the bar, who ſtands indicted on an act of parliament made in the ninth year of his late majeſty, very well known by the name of the Black Act. That act of parliament, reciting the ſeveral miſchiefs, and conſtituting ſeveral felonies, amongſt other things, enacts, that if any perſon ſhall knowingly ſend any letter, without any name ſubſcribed thereto, or ſigned with a fictitious name, demanding money, veniſon, or other valuable thing; every perſon ſo offending, being thereof lawfully convicted, ſhall be adjudged guilty of felony, and ſhall ſuffer death as in caſes of felony, without benefit of clergy.

It is on that account that this indictment now comes before you, that you have heard read. You ſee it is for ſending a letter; for it is on the firſt of theſe letters that the preſent indictment is founded; the others are ſent in conſequence of the firſt, and explanatory of his intentions.

I will open to you, as conciſely as I can, the ſeveral circumſtances we have in evidence, in order to affect the priſoner at the bar: they are circumſtances of that nature, correſponding ſo exactly with the priſoner's caſe, affecting him ſo very minutely, that the ſeveral circumſtances do infer, I had almoſt ſaid, an impoſſibility of his innocence: you will find they all tally ſo exactly, they are ſo particularly relative to him, that it will be offering violence to every rule of reaſon, not to find him guilty.

Gentlemen, on the 29th of *November*, a letter was found under the door of the *Ordnance-Office*, directed to his Grace the Duke of *Marlborough*: upon opening this letter, which was wrote in imitation of print-hand, bearing date that day, the 29th of *November*, it will be neceſſary, for the ſake of the following circumſtances, to deſire your attention to the ſeveral parts. Theſe are the words:

To his Grace the Duke of Marlborough.

November 28.

"My Lord,

"AS ceremony is an idle thing upon moſt occaſions, more eſpecially to perſons in my ſtate of mind, I ſhall proceed immediately to acquaint you with the motive and end of addreſſing

addreſſing this epiſtle to you, which is equally intereſting to us both. You are to know, then, that my preſent ſituation in life is ſuch, that I ſhould prefer annihilation to a continuance in it: deſperate diſeaſes require deſperate remedies; and you are the man I have pitched upon, either to make me, or to unmake yourſelf. As I never had the honour to live among the great, the tenor of my propoſals will not be very courtly; but let that be an argument to enforce the belief of what I am now going to write. It has employed my invention, for ſome time, to find out a method to deſtroy another, without expoſing my own life; that I have accompliſhed, and defy the law. Now for the application of it. I am deſperate, and muſt be provided for: you have it in your power, it is my buſineſs to make it your inclination, to ſerve me; which you muſt determine to comply with, by procuring me a genteel ſupport for my life; or your own will be at a period before this ſeſſions of parliament is over. I have more motives than one for ſingling you out firſt, upon this occaſion; and I give you this fair warning, becauſe the means I ſhall make uſe of are too fatal to be eluded by the power of phyſic. If you think this of any conſequence, you will not fail to meet the author, on *Sunday* next, at ten in the morning, or on *Monday*, (if the weather ſhould be rainy on *Sunday*) near the firſt tree beyond the ſtyle in *Hyde-Park*, in the foot-walk to *Kenſington*: ſecrecy and compliance may preſerve you from a double danger of this ſort; as there is a certain part of the world, where your death has more than been wiſhed for, upon other motives. I know the world too well, to truſt this ſecret in any breaſt but my own. A few days determine me your friend or enemy.

FELTON.

"You will apprehend that I mean you ſhould be alone; and depend upon it, that a diſcovery of any artifice in this affair will be fatal to you: my ſafety is inſured by my ſilence; for confeſſion only can condemn me."

This letter containing every thing that is dreadful, that might raiſe apprehenſions of terror, ſubſcribed by a name which is painful to almoſt every ear—the name *Felton!* That was the name of the aſſaſſin that ſtabbed the Duke of *Buckingham* at *Portſmouth*.

My Lord Duke, not intimidated by the letter, though greatly ſurpriſed at it, and willing to find out the author, was not afraid to endeavour to apprehend him; he went

alone to the ſpot, and at the time appointed; however, there was ſome attendant on his Grace at a diſtance, in order to obſerve what paſſed on the occaſion. My Lord Duke had been there ſome time on horſeback, and as much undreſſed as a man of his quality is. He had piſtols before him; he had been there ſome time, and ſaw nobody at all at that particular place. After waiting ſome conſiderable time, he was returning, and obſerved a perſon come to the particular ſpot juſt by the tree beyond the ſtyle in *Hyde-Park*, by the foot-walk to *Kenſington;* that perſon held a handkerchief to his mouth in a ſeeming diſconſolate manner, looking into the water, and ſtood ſtill a very conſiderable while. Upon his Grace ſeeing this, that the man was not purſuing any way, the Duke had no doubt in his own mind, but that this man (be he who he would) muſt be the perſon who had ſent him this letter. The man ſauntering juſt at the place, the Duke rode up to the ſpot, expecting the perſon would ſpeak to him: his Grace aſked the man, "Whether he wanted to ſpeak to him?" He ſaid, "No."—"Sir," ſaid the Duke, "do you know me? I am the Duke of *Marlborough;* telling you that, perhaps you have ſomething to ſay to me."—"No, my Lord."—No notice being taken, the Duke came away.

Gentlemen, you ſee this was an appointment on a *Sunday* to meet at a place where ſeveral people might be ſuppoſed to be walking. What was the view of that perſon may be ſeen by and by. The author of this letter ſpeaks of his being exceedingly guarded againſt the poſſibility of a detection; he boaſts of the care and caution he had uſed for that purpoſe,—"He defies the law,—nothing but confeſſion could condemn him,—his ſafety was inſured by his ſilence,—he knew the world too well, to truſt this ſecret in any breaſt but his own."

A few days after, in the ſame week, the Duke received a ſecond letter. This alſo was put under the door of the *Office of Ordnance*, and was alſo wrote in imitation of a print-hand: but the directions of both the letters are not; there will be occaſion to take notice of that circumſtance by and by. The ſecond letter is in theſe words.

To his Grace the Duke of Marlborough.

"My Lord,

"YOU receive this as an acknowledgment of your punctuality as to the time and place of meeting on *Sunday* laſt, though

though it was owing to you that it anſwered no purpoſe. The pageantry of being armed, and the enſign of your order, were uſeleſs, and too conſpicuous: you needed no attendant; the place was not calculated for miſchief, nor was any intended. If you walk in the weſt iſle of *Weſtminſter-Abbey*, towards eleven o'clock on *Sunday* next, your ſagacity will point out the perſon, whom you will addreſs by aſking his company to take a turn or two with you. You will not fail, on inquiry, to be acquainted with the name and place of abode, according to which directions you will pleaſe to ſend two or three hundred pound bank-notes the next day by the penny-poſt. Exert not your curioſity too early: it is in your power to make me grateful on certain terms. I have friends who are faithful; but they do not bark before they bite.

I am, &c.

&c.

F."

Gentlemen, you ſee, the writer of the ſecond letter ſpeaks of being himſelf in the *Park*, or at leaſt of knowing that the Duke was there, at the time and place appointed: and therefore this was a farther circumſtance to convince the Duke, that the perſon, whom he had ſeen the *Sunday* before in *Hyde-Park* and ſpoke to, was the writer of the ſecond letter. You ſee it ſpeaks of the Duke's punctuality as to the time and place of meeting, the particular dreſs his Grace was in, and aſſigns that as the reaſon of not ſpeaking to him the *Sunday* before: ſo you ſee, gentlemen, that circumſtance, which was a little unaccountable of itſelf, of the Duke's not being owned by the perſon whom he had ſeen the *Sunday* before, is by this ſecond letter accounted for;—"the pageantry of being armed, and the enſign of his order." He had then only a ſtar on, and that perhaps an old one, ſo as not to be conſpicuous: ſo that this accounts for the perſon's not ſpeaking to the Duke in *Hyde-Park*. There can be no doubt at all, but that the writer of the ſecond was the writer of the firſt letter.

The conſequence then of this ſecond appointment to meet the writer of the letters in the weſt iſle of *Weſtminſter-Abbey*, you will obſerve. Public places were appointed, and at public times; the firſt in *Hyde-Park*, the ſecond in prayer-time at *Weſtminſter-Abbey*, where the Duke was "by his ſagacity to point out the perſon"—the writer of this letter. The Duke accordingly went to *Weſtminſter-Abbey*, to the weſt iſle, (though indeed, properly ſpeaking, we don't know

which to call the weſt iſle, the church ſtanding eaſt and weſt). His Grace went to the weſternmoſt part of the *Abbey*, and obſerved nobody lurking or ſtanding in circumſtances ſuſpicious: after a little time, his Grace was ſurprized to ſee that the ſame perſon, whom he had ſeen the *Sunday* before exactly at the ſpot in *Hyde-Park*, appeared juſt in this place at the weſt end of *Weſtminſter-Abbey*; but he was ſurpriſed the more, that this perſon did not ſpeak to him. Perhaps his Grace had not then conſidered the tenor of this letter; for it was not to be expected, that the writer would addreſs the Duke, but rather refers to the Duke's ſagacity:—"Your ſagacity will point out the perſon," it then directs, "whom you will addreſs by aſking his company to take a turn or two with you." His Grace perhaps did not conſider this exactly; but waiting ſome time for the perſon to ſpeak to him, and finding he did not, his Grace aſked him, "Sir, have you any thing to ſay to me?" "No, my Lord."—"Have you nothing at all to ſay to me?" "No."—"Have you nothing at all to ſay to me?" "No, he had nothing to ſay to him." Now I ſhould have mentioned to you, when this perſon came into the *Abbey*, another perſon came in with him, who ſeemed by his appearance to be a ſubſtantial tradeſman, a good ſort of man. Theſe two perſons, after ſtopping and looking about at the monuments near the weſt gate of the *Abbey*, the Duke being ſure one of them was the ſame man he had ſeen before in *Hyde-Park*, his Grace thought proper to go and ſtand by them, to ſee if that perſon would ſpeak to him: ſeeing the Duke took no notice of him, they both went towards the choir: the ſtranger went into the choir, and the man that his Grace had ſeen in the *Park*, came back again (leaving his friend there) to the ſpot where the Duke was. The Duke then aſked him, "Whether he had any thing to ſay to him?" "No, he had nothing at all to ſay to him. No, he had nothing at all to ſay." Then the Duke walked a little on the other ſide of the iſle, to ſee whether the man would follow him, or had a mind to ſpeak to him at another ſpot. He obſerved the man looked eagerly at him: may-be it may be underſtood, he expected the Duke's "ſagacity would point out the man:" however, the Duke did not know what the letter required, that is, "Aſk him to take a turn with him."

At this ſecond time there was ſomebody that was with the Duke (when I ſay with him, I don't mean cloſe to him, but) near enough, ſo as to take notice what paſſed, in order to apprehend the perſon, ſo as to put it beyond all doubt, that

that he was the author of thoſe letters. The Duke, and this attendant of his, went out at the weſt door of the *Abbey*, in order to go to his coach. Now you will find by and by, in the next letter, that the writer of theſe letters took notice of this attendant, but was under no apprehenſion of being watched by any body elſe; and that will account for thoſe circumſtances I am going to mention: as ſoon as the Duke went out of the *Abbey*, that man, whom the Duke had ſeen at both theſe places, watched the Duke out of the *Abbey*, and as ſoon as his Grace had paſſed the door of the *Abbey*, he went up, hid himſelf in a corner, concealed from a poſſibility of being ſeen by his Grace in caſe he had looked back, and ſo watched him into his coach. It may be aſked, Why his Grace, upon having ſuch clear conviction in his own mind, that that perſon muſt be the writer of both the letters, did not apprehend him? His Grace will tell you, he did not think himſelf juſtified in ſo doing: he could not reconcile it to his own mind to take up a man, where there was a poſſibility of his innocence.

Gentlemen, a few days after this, came a third letter to the Duke, wrapped in a very ſmall compaſs, and directed to his Grace the Duke of *Marlborough* at his houſe. You will ſee, by comparing the directions, that this third letter was wrote by the writer of the firſt letter. It begins, "My Lord, I am fully convinced you had a companion on *Sunday*." So far it is proved, that the writer of theſe letters was in the *Park* on the firſt *Sunday*, and ſaw the Duke there; and was in the *Abbey* on the ſecond *Sunday*, and ſaw the Duke there; and that it was the ſame man that the Duke ſaw at both theſe times. "I interpret it as owing to the weakneſs of human nature; but ſuch proceeding is far from being ingenuous, and may produce bad effects, whilſt it is impoſſible to anſwer the end propoſed." —Guarded through all.—"You will ſee me again ſoon, as it were by accident, and may eaſily find where I go to; in conſequence of which, by being ſent to, I ſhall wait on your Grace, but expect to be quite alone, and converſe in whiſpers. You will likewiſe give your honour, upon meeting, that no part of the converſation ſhall tranſpire."— So that you ſee, as he was guarded before, he was determined to make it impoſſible to be diſcovered: if they were to converſe in whiſpers, and to be quite alone, it was impoſſible for other evidence to riſe up againſt him.—"Theſe and the former terms complied with, inſure your ſafety; my revenge, in caſe of non-compliance, (or any ſcheme to

expoſe

expoſe me), will be ſlower, but not leſs ſure, and ſtrong ſuſpicion the utmoſt that can poſſibly enſue upon it." You ſee, how artful he had contrived it; he was determined that nothing more than ſtrong ſuſpicion ſhould ever be in evidence againſt him.—"While the chances will be tenfold againſt you, you will poſſibly be in doubt after the meeting, but it is quite neceſſary the outſide ſhould be a maſk of the in. The family of the BLOODS is not extinct, though they are not in my ſcheme." The word BLOODS is in capital letters. That is a dreadful name! As *Felton* was the villain who aſſaſſinated the Duke of *Buckingham*, ſo this is the name of the fellow who ſeized the Duke of *Ormond*, and was going to carry him to *Tyburn* to execute him, and alſo who ſtole the crown out of the *Tower* of *London*.

You ſee, gentlemen, by this third letter, that the Duke was to expect to hear ſomething farther from the writer of theſe letters. It contains no appointment, but leads the Duke to expect he ſhall ſee the writer again as by accident, and was to obſerve where he ſhould go to, that the Duke might know where to ſend for him; and that he would come in conſequence of being ſent for; but when he came to the Duke, the terms were, to be a ſecret converſation, not in the preſence of a third perſon, and that too by whiſpers, and the Duke promiſing, upon his honour, that no part of it ſhould tranſpire, without which he was not led to think the writer ſhould diſcloſe any thing at all. The firſt letter was dated and received the 29th of *November*, the ſecond received the next week, the third in the ſecond week of *December*, and the laſt was ſome time in *April*.

The Duke waited, expecting to hear farther; but heard nothing more until the middle of *April*. About the 14th there came a letter to his Grace, wrote in a mean hand, but not in imitation of a print-hand, as the others were. Theſe are the words of the fourth letter:

To his Grace the Duke of Marlborough,

"May it pleaſe your Grace,

"I HAVE reaſon to believe, that the ſon of one *Barnard*, a ſurveyor in *Abingdon-Buildings*, *Weſtminſter*, is acquainted with ſome ſecrets that nearly concern your ſafety; his father is now out of town, which will give you an opportunity of queſtioning him more privately. It would be

uſeleſs

uſeleſs to your Grace, as well as dangerous to me, to appear more publicly in this affair.

Your ſincere friend,

ANONYMOUS.

"He frequently goes to *Storey's-Gate* Coffee-houſe."

Gentlemen, the Duke ſent for Mr. *Barnard*, the ſon of Mr. *Barnard*, according to the directions in that letter. This letter, you will ſee, bears no date at all; no memorandum, or any thing which could poſſibly indicate when the letter was ſent, or when the Duke received it. The Duke, when Mr. *Barnard* came, was ſitting in his room; and though upon opening the door of the outer room (which was at threeſcore yards diſtance from where the Duke was) yet, the moment Mr. *Barnard* entered the room, he was ſure that was the man he had ſeen both in the *Park* and in the *Abbey*. Though the Duke had no doubt in his own mind on the former circumſtances, that the perſon whom he had ſeen before was the writer of the firſt letter, now he was fully convinced that he was the writer of all the letters. The Duke was determined the ſcheme ſhould not ſo far take effect, as to engage himſelf upon his honour, that no part of the converſation ſhould tranſpire; if ſo, nothing could have prevailed upon him to proſecute: therefore you are not to expect he complied with a converſation in whiſpers, and a promiſe on the Duke's part, that no part of the converſation ſhould tranſpire. The third letter will tell you, that the perſon that entered the room was the writer of all theſe letters. As ſoon as he came into the room, the Duke, took him to the window, and aſked him, "Whether he wanted to ſpeak with him?" "No, my Lord."—No, Sir! I have received a letter, which tells me, that you are acquainted with ſome circumſtances that nearly concern my ſafety.—"Not I, my Lord." This is very ſurpriſing, Sir! This is the letter; and ſhewed him the laſt letter. Still the Duke had not given him any promiſe at all of not expoſing the converſation. Sir, it is very odd that you ſhould be pointed out to me, to acquaint me with ſome circumſtances relating to my ſafety, becauſe it mentions ſome circumſtances as to the time, the place where you are to be found, your father's being out of town, and the like. The priſoner incautiouſly ſaid immediately, "My Lord, my father was out of town at that time." At what time, Sir? The letter bears no date, nor have I mentioned to you a ſyllable when I received it: how came

came you to know when I received this letter, that you ſhould tell me your father was not in town at that time? You ſpeak clearly, as knowing when I received this letter; therefore give me leave on this occaſion to tell you, that I do not only ſuſpect you know of this letter, but that you have ſent to me ſome other letters that I have received before: then acquainting him with the other three letters, his Grace obſerving upon them, that it was very odd and ſtrange, that the letters correſponded ſo certainly and deciſively on him, he being always at the places and times appointed, and that he being the perſon named in the fourth letter too, and that he knew the time of the Duke's receiving that letter, the Duke put it upon him, Sir, I am ſurprized at the writer of this letter; one ſhould ſuppoſe from the ſtyle, and its being grammatically wrote, that the perſon who wrote it had had ſome ſhare of education; at leaſt I am ſurprized, that a man that has had any education at all, can deſcend to ſuch a means of getting money. "My Lord, your Grace need not be ſurprized at that; a man may be learned, and very poor." Very fond was he of ſoftening things. "My Lord, you need not be affrighted; I dare ſay the writer of theſe letters is a very madman." Why! you are very much concerned to apologize for the writer hereof, ſaid the Duke; picking out this circumſtance, the man does not know me, he expreſſes his very great ſurprize at my appearing in the *Park* with the enſign of my order, and my being armed. As incautious as he had been before, he is incautious upon that too, and ſaid, "Indeed I was ſurprized to ſee your Grace armed." Was you ſo? ſaid the Duke; was you ſurpriſed to ſee me armed? Can any man doubt a moment who wrote theſe letters? But however, Mr. *Barnard*, as you inſiſt upon it, and declare ſo ſolemnly your innocence, I will not ſo far invade the laws of hoſpitality, whatever crime you have done. (He would not for the world apprehend a man in his own houſe whom he had ſent for; he let him go ſafe home again; it was for that reaſon he would not give his promiſe not to reveal the converſation; but in regard to the public he was determined to proſecute.) The Duke ſaid to him, Sir, if you are not the writer of theſe papers, it much becomes you to find out who is: for your name is particularly mentioned in this laſt letter; either you are the writer, or allow me to ſay, ſomebody elſe owes you very ill-will that was the writer of them. I am relying merely on the terms of the laſt letter, wherein he was to inform his Grace of ſome ſecrets that nearly concern his ſafety: what was the anſwer that the

priſoner

priſoner made? Firſt, what would have been the anſwer? Muſt not a man be ſtruck with aſtoniſhment, to hear he was one that was to inform his Grace of things that nearly concern his ſafety, ſo much to the hazard of his own life? What became him, as having a regard to his own reputation and ſafety? To determine, as far as in his power, to find out the writer; nay, to have given the Duke aſſurance that he would do it: inſtead of that, What was his behaviour? A ſmile of contempt—an unmanly laugh in the Duke's face, as if it did not concern him at all.

Gentlemen, I ſhould think that to this there can hardly be a circumſtance added more clearly to convince any man alive of the circumſtances of this man's being the author of theſe letters; but you will find afterwards the priſoner (for what reaſon let him tell if he can) told his grace, he had deſired his companion that was with him in *Weſtminſter-Abbey* to leave him: Why? "Becauſe he thought the duke wanted to tell him of ſome place he had for him." Good God! How could he imagine he wanted to tell him of a place? A perſon whom he had never ſeen before he ſaw him in the *Park* how could he expect that? This was his aukward reaſon for deſiring his companion to leave him.

I beg pardon, if I have omitted any thing; theſe are the circumſtances that have occurred to me on this occaſion; they are ſo ſtrong and neceſſary in the proof of the priſoner's guilt, that I will venture to ſay, it is much more ſatisfactory to an indifferent perſon, than poſitive teſtimony,—the poſitive teſtimony of any man, as men are liable to miſtakes, as a miſtake in time, a miſtake in perſons, will exceedingly vary the caſe; but variety of circumſtances which tally in their own nature, cannot lye or deceive.

This proſecution is commenced merely for the ſake of juſtice; I am inſtructed to ſay from his Grace, it is perfectly indifferent to him what will be the iſſue of this trial: he thought it his duty to come here, and leaves it to his country to determine as they ſhall think proper.

The Duke of *Marlborough* was ſworn, and proved the receipt of the ſeveral letters as ſtated by Serj. *Davy*, and the circumſtances of his going to the *Park*, the *Abbey*, &c. his evidence reſpecting their meeting, in conſequence of the meſſage which the duke ſent him was as follows:

When he came in (ſays the duke) I knew, at firſt ſight, it was the ſame perſon that I had ſeen in the *Park* and in the *Abbey*. I deſired him to walk with me into a room, and immediately ſhut the door when we were in. I aſked him as before; he ſaid, "He had nothing to ſay to me;" then I told him of the

the laſt letter I received, that it mentioned his name, and that he knew ſomething concerning my ſafety; he ſaid, "he knew nothing of it." Then I recapitulated all the letters, beginning with the firſt, and remarked to him that it was ſtrange to me, that a man that wrote ſo very correct, without falſe *Engliſh* in any ſhape, ſhould be guilty of ſo low an action; he ſaid, "A man may be very learned and very poor." I then took notice of the ſecond letter, and ſaid, there muſt be ſomething very odd in the man; he ſaid, "I imagine the man muſt be mad:" I ſaid, he ſeems ſurprized that I ſhould have piſtols; ſaid he, "I was ſurpriſed to ſee your grace with piſtols, and your ſtar on." I ſaid, Why was you ſurprized at that? His anſwer was, after ſtopping a moment, "It was ſo cold a day; I wondered you had not a great coat on:" then I afterwards ſhewed him the letter again where his name was mentioned, and walked with him to the window; and as I read it, when I came to that part where it ſaid his father was out of town, he ſaid, "It is very odd, my father was then out of town." I ſaid nothing to him of that, though it ſtruck me a good deal, as there was no date to the letter. I ſaid, if you are innocent, it behoves you much more than me to find out the author of thoſe letters, particularly the laſt; for it was an attempt to blaſt his character behind his back; he ſeemed to give me a ſmile, and away he went. I did not apprehend him then.

The duke was croſs-examined as follows by the priſoner's council. In conſequence of the firſt letter, your Grace went into the *Park* on horſeback, and was there ſome time without ſeeing any body you ſuſpected, Were there not people there?

D. of *Marlb.* I ſaw ſeveral people on horſeback, and ſome few walking in a hurry on foot.

Q. Pray, my lord duke, after you had ſeen this perſon loitering, was there any thing going forward, ſuch as hunting a duck, or the like?

D. of *Marlb.* No, nothing in the world as I ſaw; it was a very cold day.

Q. Your lordſhip ſaid there was another perſon at a diſtance, an attendant on your Grace; How far might that perſon be off when you was ſpeaking to the priſoner?

D. of *Marlb.* I cannot tell exactly. I had ſpoke to him to keep a great way off.

Q. Was he in view of your Grace?

D. of *Marlb.* I dare ſay he was.

Q. Might not any perſon equally ſee that perſon as well as your Grace?

D. of

D. of *Marlb.* I ſuppoſe he might.

Q. Was your Grace there at the time?

D. of *Marlb.* I was there rather before the time, I believe.

Q. Did he in the leaſt offer to follow your Grace?

D. of *Marlb.* No, he ſeemed to go the other way.

Q. With reſpect to the ſecond letter, your Grace went according to appointment to *Weſtminſter-Abbey*, and ſaw the priſoner and another perſon come into the *Abbey*; before that other perſon had left him, had your Grace been near him?

D. of *Marlb.* I had; I ſtood by him in hopes he would ſpeak to me, if he was the perſon that wrote the letters.

Q. Whether the circumſtance was not ſuch, that that other perſon might very well believe your Grace wanted to ſpeak to the priſoner?

D. of *Marlb.* That I cannot tell. I ſtood very near the priſoner, wanting him to ſpeak to me. It is poſſible he might think ſo.

Q. Whether there were not at that time ſeveral perſons attending on your Grace?

D. of *Marlb.* There were two or three.

Q. Did your Grace ſpeak to either of them in the *Abbey*?

D. of *Marlb.* No, I did not.

Q. Whether if there was any other in *Weſtminſter-Abbey* at that time, whether that third perſon might not have taken Mr. *Barnard* for your Grace's companion, as your Grace ſpoke to him?

D. of *Marlb.* Upon my word I cannot tell that.

Q. Could there be a perſon to whom that expreſſion, in the third letter, might be applied, referring to your Grace's companion, beſides Mr. *Barnard?*

D. of *Marlb.* Yes, it might be applied to a gentleman that went away with me in the coach from the *Abbey*.

Q. Whether your Grace did not bow ſeveral times to the priſoner before you ſpoke?

D. of *Marlb.* No, I don't think I did.

Council. With reſpect to the third letter, your Grace heard no more of that till the fourth came?

D. of *Marlb.* I did not; and when the fourth came I ſent to Mr. *Barnard.*

Q. Did your Grace know Mr. *Barnard* before you received theſe letters?

D. of *Marlb.* No. I did not at all.

Q. Does your Grace now know whether he was a perſon in ſuch ſituation in life, as anſwered to the deſcription in the letters?

D. of

D. of *Marlb.* I don't know the leaſt thing of him either character or circumſtances.

Council. Then, abſtracted from theſe circumſtances, ſhould your Grace have entertained any ſuſpicion of him more than of any other perſon?

D. of *Marlb.* I did not know there was ſuch a man in the world.

Q. When he came to your Grace's houſe, did he come in very readily?

D. of *Marlb.* He did.

Q. Whether his anſwer was, I was ſurpriſed to ſee you armed too, or I was ſurpriſed to ſee you armed?

D. of *Marlb.* I cannot take upon me to ſay whether he laid ſuch an emphaſis on it or not.

Council. Then he made no ſecret of ſeeing your Grace in the *Park?*

D. of *Marlb.* No.

Council. Nor in the *Abbey?*

D. of *Marlb.* No.

Q. Your Grace mentioned, he ſaid, It is very odd, my father was out of town then! Could your Grace apply that, in the manner it was ſpoke, that his father was out of town when the meſſage came to him?

D. of *Marlb.* I really underſtood him, that he knew his father was out of town at the time of his writing the letter.

Q. Did your Grace mention the time you received it?

D. of *Marlb.* No, I did not mention any time.

Q. Did he come punctually to his time?

D. of *Marlb.* He did; I think the meſſenger ſaid he would wait on me about half an hour after ten.

Q. In what manner was he apprehended?

D. of *Marlb.* I do not know; I underſtood he was ſummoned.

Q. It has been ſaid, he went away with a ſmile; pray, my lord duke, might not that ſmile expreſs the conſciouſneſs of his innocence as well as any thing elſe?

D. of *Marlb.* I ſhall leave that to the Great Judge.

Q. He ſaid, A man might be very learned, and very poor; Does your Grace know whether this perſon at the bar is either learned or poor.

D. of *Marlb.* I do not know, indeed.

Q. May not that expreſſion fall from any man whatever?

D. of *Marlb.* I cannot ſay as to that.

Further

Further evidence was then called, which was to the following purpoſe, That when the priſoner received the meſſage from the duke; he expreſſed ſome ſurpriſe, but no fear; that he ſpoke of having ſeen the duke in the *Park* and in the *Abbey*, but that he did not know the duke in the *Park* until he told him who he was; and that in *Weſtminſter-Abbey* he thought the duke had ſpoke to him, but he was miſtaken; he alſo ſaid that he had ſome thought that the duke intended to give him a place.

The priſoner being called on for his defence ſaid,

I am intirely innocent of this affair with which I am charged; I leave it to the Court and the jury, with the evidence that will be produced.

The priſoner's witneſſes were called.

John Barnard, his father, proved that the priſoner was much employed in buſineſs, and in receiving great ſums of money; that his accounts always ſtood right, that he is a ſober man; that he told him of the Duke of *Marlborough*'s taking notice of him as a very extraordinary thing; that he perceived the duke was armed in the *Park*, and thought there might be a duel going forwards, that the priſoner often and without reſerve talked of this as a very ſtrange event—that he alſo mentioned his meeting him in the *Abbey* in the ſame terms—that on *Sunday* (the firſt meeting) he himſelf had ſent his ſon to *Kenſington* on buſineſs.

The priſoner's uncle and couſin proved circumſtances of a ſimilar nature.

Various other evidence was called which is ſtated and commented on in Mr. Serj. *Davy*'s reply.

My lord, and gentlemen of the jury,

I am ſorry to take up any more of your time; but the defence conſiſting of various parts, I would beg leave to treſpaſs a little longer on your patience, and make a very few obſervations on the caſe, as it now ſtands before you. I do not claim any merit at all, for their not oppoſing any evidence, as was attempted on the other ſide; I am ſure I ſhall be juſtified in your opinion. Nothing has paſſed in the courſe of this proſecution, but what clearly manifeſts that the duke is totally indifferent about the iſſue of it: in this matter he is only a friend to juſtice, and would wiſh for the priſoner not to be diſturbed in any method he ſhould take in the courſe of his examination: be that as it may, I have done what I have thought right, and am very glad they have done every thing they could for the priſoner.

I ſhall now conſider two general queſtions: the firſt is, Whether the ſeveral circumſtances that have been given in evidence, on the part of the proſecution, independently, are

in themſelves ſufficient to convince a reaſonable underſtanding of the priſoner's guilt; I mean, your underſtandings as jurymen. The ſecond queſtion is, Whether the defence that has been ſet up, thoſe circumſtances are ſufficient to repel the weight of the evidence; I mean, whether the defence is reconcileable to the ſuſpicions of the priſoner's guilt; for if they are irreconcileable with the priſoner's guilt, (as I do not intend to impeach the credit of any one witneſs) I am content upon that ſuppoſition, he may be acquitted: I don't mean, that any witneſs has laid a ſingle circumſtance before you that is not ſtrictly true, but that they may be reconcileable with the ſuſpicion of his guilt.

I do not mean to draw your attention back to the ſeveral circumſtances of the proſecution; they are all before you, and they are too ſtrong and ſtriking to be eaſily forgot; they would be diminiſhed conſiderably by attempting to recapitulate them, and therefore I ſhall not attempt it: and, as I ſaid at the opening, they are irreconcileable with any ſuppoſition of the priſoner's innocence, independently of the defence ſet up for him, if they are ſo ſtrong in themſelves, as it would be offering violence to one's underſtanding, not to conſider them as circumſtances neceſſarily inducing his guilt.

It will remain for your conſideration, it is now the capital queſtion, Whether theſe circumſtances laid before you, conſiſting of five or ſix parts on the part of the priſoner, may be reconciled with the ſuſpicion of his guilt? Becauſe, if they may, it is no defence at all.

Gentlemen, the firſt is, the priſoner being ſent by his father to *Kenſington* on this *Sunday* on which he met the duke in *Hyde-Park*. I did not chuſe by any means to aſk the father any queſtion; I ſhould have diſobliged my noble client, if I had done it. As, why he was ſent to *Kenſington*? What converſation might have led to that matter? What happened at breakfaſt with his father was the ſole occaſion of his going there. The ſon, you ſee, is principally concerned in conducting his father's buſineſs; he might, or he might not propoſe the expediency of ſuch a journey. It is a little extraordinary, this buſineſs (not being urgent in its own nature) ſhould be appointed by the father to be tranſacted on *Sunday*, when the father might as well have employed his time in going elſewhere: going to aſk whether a ſum of money had been paid on the account of gravel, to make it neceſſary to be ſent juſt at church-time. His father talked of his going; he did go—What does that prove? Does it prove he was not to go to *Hyde-Park* any other way? Who-

ever was the writer of theſe letters, certainly intended to have a meeting on both the *Sundays*, in the *Park* and in the *Abbey*, in a very public manner; and that agreeable to the tenor of the letter, he did provide himſelf with a defence in caſe of need. Now, be the author of theſe letters who he may, the author did contrive a ſubterfuge for himſelf afterwards, in order to reply to a charge of that nature.

Gentlemen, the next part of the defence is, that he at ſeveral times and to ſeveral people related the meetings he had had with the duke, and the extraordinary occurrences. This indeed correſponds with the obſervations I made: the writer of theſe letters propoſed to meet the duke at a time that people were walking out on a *Sunday*, and in the *Abbey*, the moſt public places, and at the moſt public times: is that irreconcileable with the ſuſpicion that the priſoner (if he was the author of theſe letters) might have been contriving with other perſons telling people of the ſeveral meetings he had had with the duke, and the ſubſtance of thoſe meetings? But one obſervation will ariſe, perhaps not much to his ſervice; and that is, when he told thoſe people of his ſeeing the duke, he ſpoke to his ſeeing an attendant, which correſponds with the ſecond letter: What does he ſay about it to the perſons to whom he relates the meeting? He ſaw he was armed—He ſaw one likewiſe at a diſtance, and he thought there was a duel going forwards. Now, when he ſpoke to the duke of the ſurpriſe he had entertained on ſeeing the duke armed, does he aſſign that as a reaſon of apprehending a duel? No; it was becauſe it was cold weather, and he wondered to ſee him without a great coat: ſo that the ſame man that ſpeaks of it to his friends as a circumſtance that might induce a ſurpriſe, ſpeaks of it at another time as being ſurpriſed, without giving that as a reaſon for it.

The next circumſtance is, Mr. *Greenwood*'s evidence of going with him to *Weſtminſter-Abbey*. There are two or three things a little particular: after breakfaſt, about nine o'clock, he ſolicits the priſoner to dreſs himſelf in order to go to the *Park*. The priſoner ſeemed unwilling to go there. He ſaid, it was not an unuſual thing, when they were to go together, for them to differ, and upon that occaſion to part. Suppoſing the priſoner wanted to get rid of this companion of his, who had laid there and was not eaſily to be got rid of, why might not that account for his being unwilling to dreſs himſelf at nine in the morning, in order to get rid of him? For he had time enough to dreſs himſelf an hour after that, and to meet the duke in the *Abbey* at eleven. It is a little odd, that the priſoner wanted to go another way, and expreſſed

expreſſed a reluctancy in going through the *Abbey*. It is clear he did not mean to be ſeen by Mr. *Greenwood* in the *Abbey*: but when he could not get rid of that, and he plucked him by the coat for that purpoſe, did they proſecute their deſign in going to the *Park*, and yet ſaunter a good while in the *Abbey?* (No reaſon why they did ſo). Firſt they went to General *Hargrave*'s monument, then to Captain *Cornwall*'s monument; there they ſtaid ſome time, the duke's behaviour being in Mr. *Greenwood*'s evidence particular; from the duke's bowing, he thought that the duke wanted to ſpeak to him in private. How is this reconcileable? There is not a circumſtance in all that part of the ſtory of Mr. *Greenwood*'s evidence, which ſuits ſo well as this of his guilt: firſt he wanted to get rid of Mr. *Greenwood*, and when he could not do that, then making no ſecret of having ſeen the Duke, and make that tally with his telling him he had met him.

The next circumſtance is Mr. *Ball*'s; and if that circumſtance of his evidence ſtrikes you as it did me, I wonder he was produced as a witneſs: for, you ſee, he was very forward: he was blamed for it by one of his witneſſes; he thought he talked too much of having met the duke; that was ſo ſingular, that it demanded animadverſions: yet, notwithſtanding, when he had had a third interview with the duke, and there appeared ſo very material a circumſtance of the duke's having charged him with a very extraordinary and wicked proceeding againſt him; when he had told him of all theſe letters, and one of them ſet forth his name, as a perſon that could inform his Grace of ſomething which nearly related to his ſafety, and hinted to him the ſtrangeneſs of theſe letters, and charged them upon him; and after having pretended a total ignorance of this matter, he afterwards conceals all this from Mr. *Ball:* and what is another circumſtance, Mr. *Ball* ſays, he was rather more cheerful in relating what he did than uſual. God knows he had no reaſon to be cheerful; for the duke had charged him home with a capital offence; the duke had admoniſhed him, and told him, either he was the author of the letters, or he was uſed exceeding ill by the perſon that did write them. Yet, you ſee, in mentioning theſe things to his friend Mr. *Ball*, *Ball* conſiders it as a fruit of the duke's benevolence to him, and ſays, he will give you a poſt in the army. The priſoner replied, It muſt be a very good one, if I accept it.

Theſe are all the circumſtances that they have inſiſted upon as proofs of his innocence, except one, that is his character. They have called to that many witneſſes; they ſay he

he is very expert in his buſineſs, a very diligent, ſober man; nothing about him as marks of diſtreſs: no vices to which they find him inclined, which give him an occaſion for a demand of this kind; and that, upon the whole, he has paſſed as a very honeſt man.

Gentlemen, when you come to conſider that, character goes but a very little, and indeed no way at all, towards proving his innocence.

In the firſt place, character can only be of ſervice to a man, where his caſe hangs as it were in equal ſcales, and it is doubtful whether innocent or guilty; there it is that a good character ſtands in ſome ſtead, and will balance the ſcale in his favour. But this is that ſort of a caſe, that this particular character they have given of him will have no weight to repel thoſe ſeveral ſuſpicious circumſtances that tally ſo exactly as to his guilt. Might it not happen, that a man betwixt twenty and thirty years of age, dependent in ſome meaſure on his father, might have a ſecret call for money, which he would wiſh his father, and thoſe friends that are fond of lending him money, not to be acquainted with? We know very well, there are certain circumſtances, ſome in this capital city of *London*, where a man might be very hard driven for the want of money, which he would chuſe to hide from his friends.

I know nothing of the priſoner's particular character; but it is enough for this purpoſe, that it poſſibly may be his caſe: if ſo, what then has the preſent character to do with it? If the circumſtances of the outlines are ſuch, can any doubt about believing he is guilty or not? Then all thoſe other circumſtances will have no weight at all to counterpoiſe the weight of the former.

As I ſaid at firſt, if upon any circumſtances offered on the part of the priſoner, if the weight of evidence on the part of the proſecution is ſufficient to charge him, there is nothing in the defence that will leſſen it at all.

Gentlemen, he is ſafe in your hands. I doubt not but that you will do your duty: if you think him guilty, you will find him ſo; if not, you will acquit him. With regard to the duke, his Grace has diſcharged his duty which he owed to the public, which he will at all times do, and is perfectly indifferent about the iſſue of it.

The jury acquitted the priſoner. *A. D.* 1758.

In a threatening letter the threat muſt be direct and plain; but the bare delivery of the letter, though ſealed, is evidence of a knowledge of its contents, and the offender

may be tried in the county where the profecutor received it. *Cro. Cir. Com.* 153. 1 *Burn*, 293. 1 *Hawk. P. C.* 226.

AT the Old Bailey in *February* Seſſion 1776, *Archibald Girdwood* was indicted on 27 *Geo.* II. c. 15. and tried by a jury of the county of *Middleſex*, for feloniouſly ſending a certain letter in writing, with the fictitious letters of *J. W.* thereto ſubſcribed and ſigned, to one *John Edridge*, of *David-Street*, *Berkeley-Square*, threatening to kill and murder him the ſaid *John*. The contents of the letter were as follow:

February 9, 1776.

" SIR,

" I AM ſorry to find a gentleman like you would be guilty of taking *Mac Alleſter*'s life away for the ſake of two or three guineas; but it will not be forgot by one who is but juſt come home to revenge his cauſe. This you may depend upon, whenever I meet you, I will lay my life for him in this cauſe. I follow the road, though I have been out of *London*; but on receiving a letter from *Mac Alleſter* before he died, for to ſeek revenge, I am come to town. I remain a true friend to *Mac Alleſter*.

J. W."

It appeared in evidence, that the priſoner had delivered this letter, ſealed up, to one *Elizabeth Robinſon*, at the gate of *Newgate*; that ſhe immediately carried it to a *Penny-Poſt-Office* in *Newgate-Street*, from whence it went regularly, as it was directed, to the profecutor in *David-Street*, *Berkeley-Square*; but there was no proof that it was the priſoner's hand-writing, or that he was acquainted with its contents.

Mr. Baron *Hotham* left it to the jury, Firſt, Whether, from the fact of the priſoner's having delivered the letter to *Elizabeth Robinſon*, they believed that he knew the contents of it? Secondly, Whether they thought the terms of the letter conveyed an actual threatening to kill or murder?

The jury found the priſoner Guilty; but the judgment was reſpited, and the following points ſubmitted to the conſideration of the twelve judges.

Firſt, Whether there was ſufficient evidence to be left to the jury of the priſoner's ſending the letter, *knowing the contents?*

Secondly, Whether there was ſufficient evidence of its *purporting* to be a letter threatening to kill or murder?

Thirdly, Whether the priſoner was properly tried by a *Middleſex Jury*, the letter having been delivered by the priſoner

ſoner *in London*, and put into a *Poſt-Office in London* by another perſon, from whence the proſecutor received it *in Middleſex*?

On the firſt day of the enſuing *Eaſter* Term, the judges being aſſembled at *Serjeants-Inn Hall*, were unanimouſly of opinion, That the conviction was right upon the *firſt* and *third* points ſubmitted to their conſideration. On the *ſecond* point ſome of the judges ſaid, That the conſtruction which the jury had given to the letter was, in their opinions, rather ſtrained; but as that was a matter which the jury had under their conſideration, the judges would not interfere.

The priſoner was executed.

In the following caſe it was determined—What ſhall be conſidered as "*ſending* a threatening letter *knowing* its contents," within the meaning of the ſtatutes creating that offence.

AT the *Old Bailey* in *May* ſeſſion 1787, *John Hammond* and *Mary Hammond* were indicted before Mr. Juſtice *Aſhhurſt*, preſent Mr. Baron *Perryn*, on the ſtatutes 9 *Geo.* I. c. 22. and 27 *Geo.* II. c. 15. for ſending a threatening letter to *Daniel Dancer*, demanding the ſum of ten pounds.

The indictment conſiſted of twelve counts, ſome of which charged, that the priſoners *ſent* and *delivered* the ſame letter; and others, that they cauſed it to be *ſent* and *delivered*.

It appeared in evidence, that *Mary Hammond* had *written* the letter in queſtion; and that it was *delivered* to the proſecutor by *John Hammond*, who ſaid he had found it in the proſecutor's garden. The priſoners were huſband and wife, and they lived in the proſecutor's houſe in the character and capacity of ſervants; but there was no evidence that *John Hammond* had any knowledge of the contents of the letter.

The counſel for the priſoner ſubmitted to the court, That the offence deſcribed by the ſtatutes 9 *Geo.* I. c. 22. and 27 *Geo.* II. c. 15. on which the indictment was founded, conſiſted in "*knowingly ſending*" a threatening letter; but that the evidence only proved that *Mary Hammond* had *written* the letter in queſtion, and that *John Hammond* had *delivered* it; and that there was no proof whatever of its having been in any way whatever *ſent* to the proſecutor.

The judges thought the objection, as to the definition of the offence, well founded. In all caſes, they ſaid, ſo highly penal as the preſent caſe is, it is certainly neceſſary not only to conſider the intention of the legiſlature, but to bring the offender within the words of the act of parliament itſelf.

The act of merely *writing* a threatening letter will not conſtitute this offence; for unleſs the writer or contriver of ſuch a letter afterwards *ſend* it to the party whoſe fears the threat it contains was calculated to alarm, it cannot poſſibly produce the miſchief which the legiſlature intended alone to ſuppreſs; and they have accordingly adapted the words of both the ſtatutes to that exigency, viz. "if any perſon ſhall *ſend* any ſuch letter, they ſhall be guilty of felony," &c. Now it is impoſſible to conceive, that *carrying* a letter can by any conſtruction be comprehended under the words "*ſend* any letter," which are the preciſe terms in which the ſtatutes are penned. There can be no doubt, however, if the legiſlature at the time they paſſed theſe acts, had been aſked, Whether the "*carrying* a threatening letter," or, to make it more like the preſent caſe, "*delivering* a threatening letter," was an offence which they meant to puniſh, and of the ſame kind as that which they had deſcribed by the words "*ſending* a threatening letter," but that they would have anſwered without doubt or heſitation in the affirmative. The judges, however, are not to conſider what the legiſlature would have done in certain caſes, but, to look at the words they have uſed, and to conſtrue them according to the meaning which it is moſt likely they entertained at the time the ſubject was under their conſideration. Now at the time theſe ſtatutes paſſed, it ſeems that the legiſlature never had it in contemplation that any perſon would be the *carrier* of a threatening letter which he himſelf had written or contrived. They undoubtedly conceived that ſuch a letter would be *ſent* by the poſt, or by ſome other *ſecret* conveyance, ſo as to prevent the object of it from diſcovering the perſon from whom it was ſent.

It is clear therefore that the act of delivering a threatening letter is not the offence deſcribed in the ſtatutes of 9 *Geo.* I. c. 22. and 27 *Geo.* II. c. 13. But if any doubt could be entertained upon this ſubject, the legiſlature itſelf has removed it; for by a ſubſequent act of parliament, 30 *Geo.* II. c. 24. the offence of *delivering* as well as *ſending* a threatening letter is made a *miſdemeanour*, puniſhable in the diſcretion of the Court, according to the circumſtances of the caſe. This ſtatute makes it evident, that where the legiſlature intended that a particular act ſhould become an eſſential ingredient in creating the offence, they knew how to make uſe of proper words to expreſs that intention; and affords incontrovertible proof, that they had it not in contemplation to make the *delivery* of a threatening letter *felony*, at the time the

the ſtatutes on which the preſent indictment is founded were paſſed.

But there is ſtill a queſtion in this caſe for the conſideration of the jury; for though *Mary Hammond* is the wife of the other priſoner, yet if the jury are of opinion that ſhe wrote the letter herſelf, without any interference of her huſband, and *ſent* it by him, without his knowing any thing of the contents, to the proſecutor, ſhe alone may be found Guilty; but otherwiſe, both the priſoners muſt be acquitted.

The learned judge left it accordingly to the jury, and they found both the priſoners Not Guilty.

VALIDITY OF UNCONSUMMATED MARRIAGES.

IN order to complete the validity of marriage, the parties muſt be 1ſt. *willing* to contract. 2d. *able* to contract, that is under no legal diſabilities, ſuch as a prior marriage, relationſhip, corporeal impotency, want of age, want of conſent of parents or guardians and want of reaſon; and laſtly the parties muſt not only be *willing* and *able* to contract but actually muſt contract themſelves in due form of law, to make it a good marriage. Theſe requiſites being complied with, the marriage is complete, and *actual conſummation* is not in law neceſſary to its validity. In the following caſe, though under circumſtances of peculiar hardſhip, even the legiſlature refuſed to interfere to diſſolve the marriage.

George Downing, without the knowledge and conſent of his father (then alive, but accounted not of ſound judgment) was, at the age of fifteen, *anno* 1701, by the procurement and perſuaſion of thoſe, in whoſe keeping he was, married, according to the church form, to *Mary Foreſter* of the age of thirteen.

This young couple was put to bed, in the day time, according to cuſtom, and continued there a little while, but in the preſence of the company, who all teſtify they touched not one the other; and after that, they came together no more; the young gentleman going immediately abroad, the young woman continued with her parents.

George

George Downing, after three or four years travel, returned home to *England*, and being ſolicited to live with his lawful wife, refuſed it, and frequently and publicly declared, he never would complete the marriage.

Fourteen years have paſſed ſince this marriage-ceremony was performed; and each party having (as is natural to think) contracted an incurable averſion to each the other, is very deſirous to be ſet at liberty; and accordingly application is made to the legiſlative power, to diſſolve this marriage, and to give each party leave, if they think fit, to marry elſewhere.

On *Tueſday*, *May* 5, 1715, this caſe was brought to a hearing before the Houſe of Peers, who, after a ſtrenuous debate of near three hours long, gave their determination againſt it, and rejected the petition; being only carried by a majority of two voices, Noes 49, Yeas 47.

The reaſons againſt ſuch diſſolution, are,

Firſt, That each party was conſenting to the marriage, and was old enough to give ſuch conſent, according to the known laws of the kingdom; the male being fifteen years old, the female thirteen; whereas the years of conſent are, by law, fourteen and twelve.[a]

Secondly, They were actually married according to the form preſcribed by the Church of *England*; the miniſter pronouncing thoſe ſolemn words uſed by our Saviour, "Thoſe whom God hath joined, let no man put aſunder." They are therefore man and wife both by the laws of God and of the land; and ſince nothing but adultery can diſſolve a marriage, and no adultery is pretended here, the marriage continues indiſſoluble.

The following was the argument of Dr. *Fleetwood*, the advocate for the diſſolution of the marriage.

"My Lords, I intreat you to favour me, whilſt I ſpeak a few words to the bill that is now brought before you, notwithſtanding what I hear whiſpered about by the people who ſtand near me, that this is a matter proper to the clergy, and that we are to acquieſce in the judgment and opinion of my Lords the Biſhops, who are agreed that ſuch a marriage as this is not to be diſſolved. My Lords, the Biſhops themſelves are (under favour) not agreed upon this matter, although the majority of the preſent ones is, as I hear,

[a] This is ſtill the age of conſent in the parties, but the marriage act, 26 *Geo. c.* 33. renders the conſent of parents or guardians alſo neceſſary, while the parties are under twenty-one.

hear, againſt the diſſolution of this marriage: but, were they all here, and all unanimous in the point, would that be a binding argument? I am a little aſhamed to hear laymen ſay, that caſes of this nature, fall not properly under their cognizance and conſideration, but are to be decided by the clergy only. There are no ſuch difficulties in the caſe before us, as I apprehend it; it is what we may all of us underſtand, and I believe we moſt of us do: and to defer and yield entirely to authority, where we are able to hear reaſon, and to judge, is a ſubmiſſion that is no more due, than, I dare ſay, it is expected by that venerable bench. I will therefore, with your lordſhips indulgence, ſpeak my mind in this matter freely.

"I hear it is ſaid, my Lords, that a marriage which was once good and valid, is for ever after that indiſſoluble, unleſs in the caſe of adultery. I wonder, by the way, how they came to except the caſe of adultery; for though our bleſſed Saviour has excepted the caſe of adultery, yet the ſtream of authority, the generality of thoſe great men, whom we call the fathers of the *Latin* Church, together with the rabble of ſchoolmen and commentators, have almoſt to a man, denied the innocent party the liberty of marrying again, although divorced from an adulterous partner: and I would fain know, how much a divorce is worth above ſix-pence, without leave to marry again, if the injured party pleaſes? But I only mention this, to let your Lordſhips ſee, whither the reverence of authority alone, and great names, may carry thoſe, who will be led tamely by them, and will not uſe the reaſon and good ſenſe which God has given them.

"I aſk your Lordſhips' pardon for this digreſſion, and come to the point. A marriage, we are told, is good, where the parties concerned were at age and liberty to conſent, and actually conſented, and were actually married by the form preſcribed in the book of Common-Prayer. And ſuch a marriage, we are alſo told, is indiſſoluble by the law of God. I will not waſte the leaſt of your Lordſhips' time in needleſs cavils, but take it for granted, that the man now concerned was fifteen years of age, and the woman thirteen, which are years of conſent by the laws of the land, and that they were actually married by the preſcribed form. But I deny that the marriage is therefore indiſſoluble by the legiſlative power of the land, and that for many reaſons.

"My Lords, the years of conſent are not fixed to fourteen or twelve, either by nature, reaſon, or any law of God; but

but purely and merely by the poſitive laws of the land, which may change them to-morrow; and if they were changed to day, no man in *England* would, I dare affirm it, be diſſatisfied: it ſeems ſo ſenſeleſs and unreaſonable to give our children the power of diſpoſing of their perſons for ever, at an age when we will not let them diſpoſe of five ſhillings without direction and advice. But I inſiſt not upon that at preſent; the law is already made, and I conſider it as ſuch; but ſtill it is but a human law, and the ſame power which determines it to bind in the general, may, if it ſeem fitting, determine it not to bind in this, or any ſuch particular caſe; and that without offence either to God or man. The laws indeed muſt fix upon a certain time, or otherwiſe the ſubject will want direction, and a rule to go by. And let us take it for granted now, that the time fixed by the laws is a reaſonable and fitting time for ninety-nine people in a hundred; yet if the hundredth perſon be aggrieved to death, or worſe than death, by ſuch a law, what is the impediment, what the danger, what the miſchief, of declaring the hundredth perſon not to be bound by that law? If it were poſſible for human wiſdom to foreſee all the inconveniencies and miſchiefs that can ariſe, would not the legiſlative power provide a remedy for all? Would it not make its rules as comprehenſive as it could, ſo that they might compriſe and take in all caſes and perſons poſſible? But this we find was never done, nor ever will be done: no foreſight is ſufficient for all accidents: but there is room for after-thought; and a power to cure the evils which it could not prevent, becauſe it could not foreſee, is lodged in every government. It is to that power we have now recourſe: we pray relief againſt a law, which however juſt and fitting it may be thought in itſelf, and beneficial to others, binds us to nothing but miſery; and truly kills, according to the letter. The man and woman were at age, according to the law, but wanted that maturity and forwardneſs of age, which the law ſuppoſes and requires in people of twelve and fourteen, when it makes them capable of marrying at thoſe years. They give conſent indeed with their tongues, and pronounced the ſolemn words, by which they mutually delivered up themſelves each to the other; that is, they did as they were bid to do, and ſaid juſt as the parents and prieſt commanded them to ſay. But where was the conſent of heart? Where was the knowledge and underſtanding that is requiſite to the forming a reſolution of this nature, and to the making ſuch a ſolemn contract? My Lords, the children were entirely paſſive in

the matter, and very obedient to the orders of thoſe that governed them; and would have given away their fortunes and their liberties, and every thing they had, had they been bid to do ſo in the ſame manner. I may affirm, becauſe I have taken great pains to be informed of the truth, that this young couple came together to contract, and to conſent to marriage, without ſo much as the deſire or appetite of being married; without ſo much as knowing what it was they were to bargain and contract for: they conſented to give the uſe and the dominion of their bodies each to the other, as long as they both ſhould live, without ſo much as underſtanding what they meant when they ſaid ſo; without ſo much as an ability of making good their promiſes and engagements.

"This, my Lords, is the conſent this couple of young and thoughtleſs creatures gave; and this conſent the church it ſeems inſiſts upon. The ſolemn promiſe was pronounced in ſolemn manner by the prieſt, and the children were bid to ſay after him, and ſaid after him, and then the knot was tied, that nothing can looſe but death. Is there any thing in the world ſo like a charm as this? My Lords, there is not any contract in the world but may be utterly diſſolved by the free conſent of parties, if without prejudice to any third. I like a horſe that is in any man's poſſeſſion, and he likes the price I offer for it; we thereupon agree, and paſs our words each to the other: his promiſe then gives me a right to the horſe, and my promiſe gives him a right to the price agreed upon. But in a little time we each of us bethink ourſelves, and each diſlikes the bargain he has made, and each agrees to ſet the other at his liberty: I have not uſed your horſe, nor have you gotten my money. Here the contract is utterly diſſolved by the conſent of parties, and no third man is hurt thereby. Will any man ſay that we have done amiſs? Will any one ſay that we have ſo much as broken our word each to the other? The word I gave to him was to ſecure his bargain; the word he gave me was to ſecure mine. If he diſlikes the bargain, he gives me (as it were) my word again; and ſo do I to him, and then we are again at liberty. My Lords, if we ſhould carry the matter farther yet, and to ſecure the bargain we ſeem at firſt ſo fond of, ſhould give our oath to each other, in preſence of a great company, and with what ſolemnity beſides you will, yet I affirm, (and ſo do all the caſuiſts in the world, as I am told by thoſe who know) I ſay, my Lords, that I affirm, that if in this caſe, after this ſolemn oath, we ſhould both of us freely conſent to break this

this agreement, and nobody elſe be hurt thereby, we ſhould neither of us be guilty of perjury, or breach of an oath. Our oaths were given to each the other, to ſecure the promiſes that were made; and if we, each of us ſee reaſon to conſent, and freely do conſent, to releaſe each other of his promiſe, the oath can lay no farther obligation on us. I promiſed, and I ſwore I would perform that promiſe to him; he did the ſame to me; but neither of us, after ſome time, cared, or required, to have ſuch promiſe made good to him; our oaths muſt therefore follow the nature of our promiſes; and when the promiſe is releaſed, the oath is ſo alſo. It may be we both of us did amiſs, in calling God to witneſs, (as in an oath men are preſumed to do) in an affair of ſo light moment: I will not diſpute that now, but I maintain that ſuch an oath obliges not, if the promiſe, for whoſe ſecurity the oath was given, be mutually releaſed, and nobody hurt thereby. My Lords, I appeal to thoſe who underſtand theſe matters, whether what I ſay be not true.

Whence is it then, that the marriage-contract ſhould be indiſſoluble, when all other contracts, though confirmed with ſolemn oaths, may be diſſolved, if the contracting perſons agree to ſuch a diſſolution, and no third perſon ſuffers by it? How comes a promiſe of this nature to differ from all other promiſes whatever? Oh, ſay the Popiſh caſuiſts, it is becauſe this ſame matrimony is a great ſacrament. No, ſay the Proteſtant divines with us, it is no ſacrament, but it is the ordinance of God, inſtituted in Paradiſe, in the time of man's innocence, and ſignifies to us the myſtical union that is betwixt Chriſt and his church; and the promiſe is made with all ſolemnity, in the preſence of God, in the church, before the prieſt and all the company, and confirmed with the words of Chriſt: and therefore a conſent and promiſe made in ſuch a ſolemn manner can never be retracted or diſſolved.

My Lords, I intend not to ſay one word againſt the dignity of marriage. But I do not think that the ſolemnity of words, of place, and company, in which a contract is made, adds any ſtrength or virtue to ſuch contract, or makes it more obliging.

A man indeed will certainly be more aſhamed to break a promiſe made at church, and before a great company, than he will be to break ſuch a promiſe made to his friend alone, at his own houſe. But is he more obliged in conſcience to keep his public promiſe than his private one? Will any honeſt man ſay that? The obligation therefore does not ariſe from the ſolemnity of words, and place, and company, but from the

the free and voluntary promiſe which a man makes, and the right he thereby gives to another. The ſcandal alſo and offence that is given and taken by a breach of promiſe, made in ſolemn manner, is indeed greater, than is occaſioned by the breach of a promiſe made in private: but the reaſon of that is, becauſe more people know of it; for if the ſame people were aſſured that ſuch a promiſe was indeed made, although in private; they would as certainly condemn the breach of it, as they would, had it been made before them all; and they would be as much ſcandalized at ſuch a breach, as if they had been witneſſes to the making the promiſe: which is a proof that a man's obligation to keep his promiſe ariſes from his having freely made it, and not from his having made it in ſuch a place, and before ſuch a company, and in ſuch a particular form of words.

The firſt marriage that ever was made, was made without any words at all, that we know of, expreſſing their conſent, and it was ſo clandeſtine, that there was not ſo much as a mortal man by, no not a prieſt, to join them together: but God who made them, brought the woman to the man, and inſtructed them by reaſon and natural principles, that they were made each for the other. There was conſent of heart, and union of affections. But I inſiſt not upon the example; it is too ſingular to be a rule. Years of age are neceſſary; and conſent, in expreſs words, mutually given and taken, is neceſſary to make a marriage-contract good and valid.

This is the ordinance of God, this is of divine appointment, that one man and one woman ſhould freely and knowingly give conſent to be each others, to all the ends and purpoſes of matrimony, as long as they both ſhould live, and ſhould not be allowed to give themſelves to any one's uſe beſides.

And all that Chriſt added (if indeed he added any thing, or did any more than revive it) to this original inſtitution was, that when either of the parties brake their contract by adultery, the innocent party was at liberty to ſeparate from the faulty one, and marry another, if it were thought fitting. Since therefore all that is abſolutely neceſſary to the making a marriage-contract, is, that a male and female, who are at age, and liberty to conſent, ſhould actually conſent to give the uſe and dominion each of their bodies, to the other; and, excluſive of all others, to live together faithfully till death parted them: ſince this is ſo, I do affirm, that *Caius* and *Caia*, two Heathens, giving their conſent, in the manner above-mentioned, in their father's parlour, are man and

and wife according to God's ordinance; their marriage is as true, as good, and as innocent a marriage, in the ſight of God, as the marriage of a *Jew* and *Jeweſs*, though both in covenant with God, made before the High-Prieſt himſelf, with all the ceremonies you can imagine, and in what form of words you will, before a hundred witneſſes, and at the altar in the temple of *Jeruſalem*.

I am, my Lords, ſo ſatisfied of the truth of what I ſay, that I go on to ſay, with all aſſurance, that the marriage-contract of this *Caius* and *Caia* was as good, as binding, and as innocent as the marriage-contract of any Lord in this aſſembly, though ſolemnized in the Church of St. *Paul*'s, according to the eſtabliſhed form in the Common-Prayer, by his Grace my Lord Archbiſhop of *Canterbury* himſelf, repeating thoſe moſt ſacred words of Chriſt, "Thoſe whom God hath joined, let no man put aſunder." And I aver, that God did as ſurely join *Caius* and *Caia*, when they conſented to become huſband and wife for life, as he has joined any couple elſe for theſe ſeventeen hundred and fifteen years. So that I hope, my Lords, you will not ſuffer your eyes to be dazzled with the pomp and glitter of great words, and awful ſounds, which fly before good ſenſe, and vaniſh when you come to look into the reaſon of things.

Caius and *Caia* muſt expreſs their conſent in words and ſigns appointed by the laws of their country; and muſt be married by the perſons ſet apart for ſuch ſervice, according to the rites and ceremonies of their religion: ſo muſt the *Jewiſh* pair, according to theirs; and ſo muſt *Chriſtians* alſo. But there is ſomething common to them all; and that in which they all unite muſt needs be that which makes the marriage-contract valid and obliging. And what is that, but that a male and female ſhould be at age to conſent, and at liberty to conſent, to give to each the other the uſe and dominion of each other's body, excluſively to all the world beſides, as long as they both ſhall live?

This is properly the marriage-contract, and common to all nations and religions; and all beyond this is matter of ceremony, decency and prudence; and ordered by the legiſlative powers of different countries, as they ſee convenient. And I do not ſo much as pretend to diſpute the force and obligation of theſe laws, to ſuch as are ſubject to theſe different powers; they are, and may, and muſt be binding as to the dowries of the wives, and the legitimation of children, and their inheriting eſtates and honours, and in all ſuch like caſes.

My

My Lords, ſo much has been ſaid in favour of the ſolemnity of words, of place, and perſons, which are in truth, but circumſtances to a marriage-contract, that it has made me ſpend ſo much of your time, to try to lay aſide that prejudice, and to conſider the preſent contract in itſelf. We were not of age ſufficient for conſent, although we were of age according to the letter of the law. We gave our conſent to be married, but it was not the conſent of underſtanding, for we knew not what it was that marriage meant. We repeated very ſolemn words, after the prieſt, as we were bidden; but it was but the labour of the lips; the heart did not, the heart indeed could not go along with them: for whether we take the heart for knowledge, or deſire, there was no heart concerned in all this matter: we neither of us knew the nature of the contract we were making; we neither of us had ſo much as the deſire of doing what that contract both ſuppoſes and requires. And now, my Lords, we humbly hope you will not let us be at age, only to do ourſelves irreparable miſchief; nor call that a conſent, which is to complete our ruin, and which can ſerve no other end.

We do not deny ourſelves to have been at legal age; we do not deny that we have given a verbal conſent: but we deny ourſelves to have been at years of underſtanding, to give ſuch a conſent as is reaſonable and fitting in a matter of ſuch importance. And we appeal to your Lordſhips equity, whether this age and this conſent ſhall ſtand good to our undoing, and to the advantage of no creature in the world beſides: for who, my Lords, will be the worſe for ſetting us at liberty, or who will be the better for our being bound? I am exceedingly ſenſible, that I have treſpaſſed much upon your Lordſhips patience, but I am bound in juſtice and in conſcience to beg a little more of it, to ſpeak a word or two to the laſt part of the objection, That ſince the parties before you, in petition, are man and wife both by the laws of God and of the land; and ſince by the laws of God nothing but adultery can diſſolve a marriage, and no adultery is pretended here, the marriage of conſequence continues indiſſoluble.

To ſave your Lordſhips time, I will grant every thing that can be granted; I grant, that by the laws of God, nothing can diſſolve a complete marriage but adultery; and I grant, that no adultery is pretended in this caſe; but I deny that this marriage before you, is therefore indiſſoluble, becauſe I muſt and do deny the marriage before you to be a complete marriage, by the laws of God: and, I hope,

hope, with your Lordſhips favour and indulgence, to ſhew it is not a complete marriage, becauſe it never was conſummated.

The love and the deſire that men and women have of each other, is what is implanted in the hearts of all of them, by God himſelf who made them; and is therefore as innocent an appetite as any elſe they have; and it has (as every other appetite) its proper ſatisfaction provided for it by the good Creator; and when it fixes on its proper object, is ſatisfied as innocently, as the deſire of meat, or drink, or ſleep can be. Marriage, my Lords, is fixing the deſire upon its proper object: and this deſire is never to be ſatisfied with innocence, but in the marriage-bed. The end of marriage therefore is the ſatisfaction of this appetite. This is the end and purpoſe of God in making them male and female; this is the way, the only way, of their becoming one fleſh; and therefore till the end is anſwered, where it can be anſwered, marriage is not perfect and complete. God cannot properly be ſaid to have joined thoſe together, who never joined themſelves together, in the natural way of his appointment; and therefore, under favour, it is a great miſapplication of thoſe ſacred words, to the caſe before us, where the two parties never came together in the ſenſe intended by thoſe words.

What can be plainer than this propoſition?

The end of marriage, by God's inſtitution, is, that two ſhould become one fleſh.

The two before you in the bill were never yet one fleſh. Your Lordſhips will make the concluſion.

"Thoſe whom God has joined let no man put aſunder."

The two before you in the bill were never yet conjoined by God, in the true meaning of thoſe words; they may therefore as yet be put aſunder by men; as I hope they will by your Lordſhips.

My Lords, the eaſineſs of granting a divorce in caſes of impotence, is a good proof that marriage is not complete and perfect where the ends of it are not to be obtained; nay, it is a proof that it was no marriage, but a nullity from the beginning, although the parties were at full age, although they gave a free conſent, and were married with all formalities; although the prieſt pronounced them man and wife in the name of the Father, Son, and Holy Ghoſt, and ſaid thoſe ſacred words over their heads, "Thoſe whom God has joined, let no man put aſunder," they were not man and wife, becauſe they could not become one fleſh: they were not joined by God, becauſe they could not join themſelves

themſelves together. Your Lordſhips will conſider therefore whether a marriage not conſummated (nor ever like to be conſummated) be a complete marriage in God's ſight; ſo complete, I mean, as to be indiſſoluble. I ſhall be told, I know that in the caſe before us, there is now no defect of power, no impotence or inability to complete the marriage pretended, but want of will.

I own it, and I only uſe the inſtance to ſhew that a marriage not conſummated is not indiſſoluble by the laws of God; and that an utter averſion to the conſummation of marriage, in both parties, is as good a reaſon, for a divorce, as an inability in one party, which never fails of procuring a divorce. In the one caſe, the parties are each of them untouched, pure and unſullied even in thought; whilſt in the other, there muſt paſs ſuch things, as I have neither will nor leave to mention; and yet a divorce follows of courſe. My Lords, if ever we had come together in this manner, I had not had one word to reply on this occaſion; all I have ſaid of our want of age would have ſignified nothing; all I have ſaid of our giving no conſent had been ſaid to no purpoſe; had conſummation followed any time within theſe fourteen years, we muſt not have appeared in this place. But when, to our want of age, and want of knowledge to conſent to marriage, we can alſo add, that we have never come together to complete this marriage, and that we are as pure from each the other, as we were when born, we humbly hope your Lordſhips will deliver us from the chains which the laws of our country only have bound us with.

It is ſaid, my Lords, that conſummation is not neceſſary to complete a marriage, becauſe a man is maſter of the woman's fortune, and the woman has a right to her dowry, although the man or woman ſhould chance to die before the nuptial-bed were made ready. My Lords, I grant, that when the parties who were at age, and liberty, have given their conſent, and the prieſt has done his work, according to the form preſcribed, the law is ſatisfied, and looks no farther; and gives each party a right to all the advantages agreed upon, though conſummation follow not: the laws ſuppoſe that what is reaſonable and fitting will follow, and only ſecures legal advantages that are contracted for. The other is a point of duty and conſcience. I only aſk whether there be a man or woman in the world, who thinks that the end of marriage, as it is God's ordinance, is fully anſwered, till it be conſummated? My Lords, we come not here to ſay that a marriage is not a legal marriage, till conſummation; nor to aſſign a day, or a week, or a month, for ſuch completion:

completion: we preſume not to trifle in that manner in ſuch an aſſembly as this. We only mean to ſay, that a marriage not conſummated, is diſſoluble, without offence to any law of God; and that a marriage of that kind is not a complete marriage in his ſight: the full purpoſe of his inſtitution is not anſwered till they become one fleſh. All that goes before is previouſly neceſſary to the making ſuch conjunction innocent, but it is not what is mainly and principally intended by him who made them male and female. And therefore it is but an impertinence to tell us that *Adam* and *Eve* were completely married before they went into the bridal-bower: it is ſo with every honeſt couple, as well as with our firſt parents; but would they have been completely married had they never gone into that bridal-bower at all, and lived for many years? What marriage, I pray, would that have been? They might have been good company and good friends, but they could no more have been ſaid to be man and wife, with reſpect to what God intended by marriage, than two men, or two women, living together in unity and amity, may be ſaid to be married together. I believe it would puzzle the doctors to prove that *Adam* and *Eve* were ever married at all, any otherwiſe than by a mutual conſent to go together; for there was no conſent of any ſuperior to aſk or obtain; and there could be no need of promiſing to be faithful to each other, for there was nobody elſe to go to. I wonder ſuch an inſtance ſhould be pitched upon.

But now, my Lords, I come to the great argument of all, which is brought to prove a marriage complete, though its effect never follow; and that is, that *Joſeph* and the *Bleſſed Virgin* were, and are often called in the Holy Scripture, man and wife, although we are ſure by ſcriptures they never came together till the holy Child was born; and, by tradition, ſure they never came together after it was born.

This example I take to be the ground and bottom of all thoſe abſurd doctrines and propoſitions that are raiſed in maintaining a marriage to be complete by the conſent of parties, and the benediction of the prieſt, without any other fruit or effect. *Joſeph* and the *Bleſſed Virgin* were certainly eſpouſed and betrothed each to the other; and he thereby became ſo much her huſband, that he thought of putting her away, which ſhews he thought ſhe was his wife: and he is called her huſband by the Evangeliſt St. *Matthew*; and ſhe herſelf calls *Joſeph* the father of her Son, "Thy father and I have ſought thee ſorrowing:" and a little before they are called his parents. There is not a word of all this that I either do, or dare deny. Be pleaſed, my Lords,

but

but to remember and obſerve, that the ſame ſcriptures that call *Joſeph* the huſband of the *Bleſſed Virgin*, do alſo call *Joſeph* the father of her ſon; and the ſame ſcriptures that call *Joſeph* and *Mary* huſband and wife, do alſo call *Joſeph* and *Mary* the parents of Jeſus. And he was in truth as much the huſband of the *Virgin* as he was the father of her ſon; and much in the ſame ſenſe, and to the ſame purpoſe. My Lords, I have taken ſome pains to underſtand this matter, and what I am going to ſay I have from very good authority, living as well as dead, for it is ſomething out of the way of my profeſſion. It was abſolutely neceſſary, by God's appointment, that the Saviour of the world ſhould be born of a woman: and it was, by the ſame appointment, full as neceſſary that he ſhould not be the Son of Man, in the common way. To reconcile theſe difficulties therefore, he was "conceived by the Holy Ghoſt," and "born of the *Virgin Mary*." But becauſe this Saviour of the world was to be, in eſpecial manner, the Meſſiah of the *Jews*, he was to be born a *Jew;* to deſcend from *Abraham*, according to the promiſe, of the tribe of *Judah*, of the houſe and lineage of *David*. This Meſſiah the *Jews* expected ſhould be born as other men were born; and they would never have received him as ſuch, or heard him as a prophet and teacher ſent from God, unleſs they had believed him to be born in lawful wedlock; as they certainly did, or elſe you would have heard of it over and over in the Goſpels, which conceal none of the ſlanders, contumelies and reproaches, which the *Jews*, upon all occaſions, did ſo plentifully pour upon our Saviour. Had the bleſſed *Mary* not been married, what would the people have ſaid of her? What would they not have ſaid of her and of her ſon? It was therefore abſolutely neceſſary to the *Jews* receiving Chriſt for the Meſſiah, and hearkening to him, that he ſhould be born under the reputation of marriage; which could not be unleſs ſhe took a huſband in the uſual manner. You ſee what entertainment both his perſon and doctrine found, although he was ſuppoſed to be born in wedlock, and of honeſt parents, only becauſe of their mean and low condition; but what had been his fortune, had they thought him ſpurious?

I am almoſt ſorry I have occaſion to ſpeak of theſe matters; and I reſtrain myſelf from going on, in hopes that enough is ſaid to ſhew, that the marriage of *Joſeph* with the *Bleſſed Virgin* was all (as I am told the ancient chriſtian writers call it) according to œconomy. It was to ſave appearances; to cover both the mother and the ſon from the reproaches of ignorant malicious people, till it ſhould pleaſe

God, in his own good time, to manifeſt the truth more clearly to the world; and therefore though it might be wrapped in prophecies before his birth, yet it was not till after his death that it became an article of faith, that he was "conceived by the Holy Ghoſt," and "born of the Virgin Mary." During the life of Chriſt, *Joſeph* was the ſuppoſed huſband of the *Bleſſed Virgin*, and the ſuppoſed father of her *Bleſſed Son*: and under the cover of that relation, was to take upon him, under God, the care and protection of them both.

Will any man, after this, pretend to ſay that this was a complete marriage, as marriage is the ordinance of God? It was complete to all the ends and purpoſes that God intended by it: it ſcreened the mother and the ſon from blame and ſlander; and it provided for them ſuch a defence and maintenance as was convenient. But what is this to God's original inſtitution? Or how can ſuch a thing be drawn into example? *Joſeph* and *Mary* are ſaid to be married, although they never did complete that marriage, although they never muſt complete it, therefore a marriage-contract is a complete marriage in any one elſe as well as them, although they proceed no farther! That is, (I humbly pray your Lordſhips to obſerve) there was a marriage-contract made, about ſome 1715 years ago, betwixt a holy man and the moſt excellent and holy maid that ever lived upon the earth; placed in ſuch circumſtances as never happened before, nor ever will happen again; and this couple, by God's appointment, never were to touch each other, in the matrimonial way, till the birth of a child, that was to be called (becauſe he truly was) the Son of God. Now this moſt rare, moſt ſingular, moſt unexampled inſtance, is brought to convince your Lordſhips, that a bare marriage-contract makes a complete marriage, according to the laws of God, without proceeding any farther, in every other couple that is married: and the parties, for whom I now appear, are ſaid to be completely married, although they never came together, becauſe the *Bleſſed Virgin* and *Joſeph* were completely married, although they went no farther than a marriage-contract, nor ever could go farther, by God's appointment. My Lords, if ſuch an example as this can operate ſo extenſively and ſtrangely, we muſt give over making conſequences in the way of reaſons, and attend to the dictates of our ſpiritual maſters, without examining what it is they ſay. I do not know what form of words the *Jews* made uſe of when they were married; but I know, methinks, that the form preſcribed by the church of *England* would have been very odd, improper,

improper, and abſurd, to have been uſed to that bleſſed couple, when it deſcribes the ends of matrimony to be, Firſt, For the procreation of children: Secondly, For a remedy againſt ſin; and Thirdly, For mutual ſociety, help and comfort, that the one ought to have of the other. The ſum of all this is, that the ends of this particular marriage, which God intended, were fully anſwered by a marriage-contract only; but the ends of marriage in general, as it is God's ordinance, neither were, nor might be anſwered by ſuch contract only; and therefore it is an abſurd unreaſonable thing to argue from the completeneſs of the one, to the completeneſs of any other, that may proceed farther, and that ought to proceed farther, and is certainly not complete till it does proceed farther.

Another argument to prove a marriage to be complete, by a marriage-contract only, without proceeding to conſummation, is fetched from the law of *Moſes*, *Deut.* xxii. 23. where a woman, betrothed or eſpouſed to a man, is to be ſtoned to death, as an adultereſs, if ſhe admit another to her bed; which ſhews that the validity of marriage proceeds from the mutual covenant and conſent that two have given to be each others.

My Lords, I yield to every word of this, and to whatever elſe can be ſaid of the ſame kind. A marriage-contract does certainly give a right to every thing contracted for. As ſoon as we are married, I have a right to her perſon, a right to her fortune, a right to her reputation; and if any one injure her in any one of thoſe particulars, I have a right to her vindication: for ſhe is really mine, and I am hers: and I own I am as much married to her the firſt morning, and ſhe to me, as I ſhall be the morning or week after, as to all the ends and purpoſes which human laws can propoſe, or take any cognizance of. And if ſhe abuſes any one the hour after ſhe is married, it is I muſt anſwer for it. If ſhe gives away any of her goods, which are now become mine, why nobody can receive them; I ſhall recover them, for they are mine. And if ſhe give away herſelf, (though I have never yet come near her) ſhe is certainly an adultreſs; ſhe has given away what is mine, and broken her faith and contract, and is liable to whatever penalty the laws of the country think fit to inflict upon ſuch offenders. I could moreover anſwer this law of *Moſes*, by another law of the ſame *Moſes*, which ſets a man at liberty from a maid he was betrothed to, if ſhe pleaſe him not when the time of marriage comes. It is in *Exod.* xxi. 8. And the only difference is, that the maid betrothed in *Exodus* was not free, but a

ſervant; the maid betrothed in *Deuteronomy* was a free woman. But though this makes a great difference in the laws and cuſtoms of a country, yet certainly it is none in point of conſcience: the obligation there, is alike to bond as free, if other circumſtances make no difference. But the anſwering one objection with another clears up nothing. I own that the validity of marriage proceeds from the mutual covenant. But pray what is this mutual covenant? Is it not the conſenting and agreeing of a man and woman to give to each other the uſe and dominion of their bodies, excluſive of all the world beſides, as long as they both ſhall live? What is it that parties contract for? What is it people conſent to upon theſe occaſions? I know it is ſaid by father *Ambroſe*, *Connubium non facit defloratio virginitatis, ſed pactio conjugalis*. And it was ſaid before him long by father *Ulpian*, *Nuptias non concubitus ſed conſenſus facit*. And certainly every body will ſay after them, that the agreement of a man and woman to lie together, does not make a marriage. But will St. *Ambroſe* tells us, that a *pactio conjugalis* (a marriage-covenant) can be fully anſwered without concumbency, if the parties live and are not hindered? In truth I will not anſwer for the father, who (as the reſt of them) had *Joſeph* and *Mary* always in his eye: but I will anſwer for the civil lawyer, who, I am ſure, would never ſay a marriage was complete, that was not, if it could have been, conſummated. Hear what *Modeſtinus* ſays, *Nuptiæ ſunt conjunctio maris & fœminæ, & conſortium omnis vitæ*. It is true, he was a heathen lawyer, but had he alſo added, that marriage was ordained to be a remedy againſt ſin, he had talked the language of our Common-Prayer-Book. For he ſays it is for the procreation of children, (*conjunctio maris & fœminæ*) and for mutual ſociety, help, and comfort, that the one ought to have of the other, and taking each other for better for worſe, which is but the *Engliſh* of *conſortium omnis vitæ*. *Paulus*, another *Civilian*, ſays, that *Nuptiæ conſiſtere non poſſunt niſi conſentiant omnes*; i. e. *Qui coeunt, quorumque in poteſtate ſunt*. There is no ſuch thing as a right marriage, where there is not the conſent of all parties; i. e. the conſent of the two, *qui coeunt*, and the conſent of parents, or guardians, in whoſe power and diſpoſal the young ones were. All writers in the world agree, that conſent, covenant, contract (call it what you will) is ſo neceſſary to a marriage, that it cannot be valid without it; but then they alſo ſay, that ſuch a conſent is a conſent to anſwer the ends of marriage; that ſuch a covenant is a covenant to live together according to God's ordinance; and that ſuch a contract is a contract for the

the uſe and dominion of each other's body; which is, in effect, neither more nor leſs than what St. *Paul* has ſaid in 1 *Cor.* vii. 3 and 4, which I repeat not, becauſe it is ſo well known. But they who think a marriage is a complete and perfect marriage, according to God's ordinance, (for as to human poſitive laws, I conteſt it not) although it never be conſummated; they I deſire may read that paſſage, and conſider it.

My Lords, there is another ſlight objection, which I will but juſt mention, and that is, That the church allows the oldeſt people that are, to be married, and accounts their marriage good, although there is neither hope nor likelihood of having children; and accordingly appoints the prayer for that purpoſe to be omitted and left out: and therefore a marriage is complete by contract only, without any conſummation.

The argument, I think, is this, That becauſe a marriage is a good marriage which is not conſummated, becauſe it cannot be by reaſon of people's age, therefore a marriage is a good marriage, though not conſummated, which yet may be conſummated any day in the year. If this be a right inference, there is no making a wrong one, for one can never make a worſe. My Lords, the church neither does nor can pretend to determine when people are too old to marry: it meddles with no ſuch matters, but leaves every one to their diſcretion. She ſeems to aſſign three ends of marriage, which I have had occaſion to mention before; and if the firſt cannot be anſwered, the ſecond may, and ſo may the third, though the other two ſhould not.

And now, my Lords, I hope I have ſhewn that the bill before you is a good bill; that the divorce we ſue for is very reaſonable and juſt, and that ſuch a marriage as ours, made at ſuch an age, with ſuch a conſent, as is indeed no conſent, and never conſummated, though fourteen years ſince, is ſuch a marriage as may very innocently be diſſolved without any manner of offence to the laws of God. And I deſire any man to aſſign any one law of God that would be hurt thereby, unleſs we are made to believe, that every law of the church is alſo a law of God; which when I hear affirmed, I ſhall not want an anſwer to it. But I am ſure the laws of God, which are properly ſo called, are to be found in a holy book, where nothing appears againſt us. For as for thoſe paſſages, which allow a man to put away his wife for no cauſe but that of adultery; it is certain to a demonſtration, that they refer to marriages that have been completed

and conſummated by man and wife. And if your Lordſhips would indulge me ſo far, I would venture to ſay, that no man of common ſenſe, can read thoſe paſſages and think otherwiſe. My Lords, he muſt be a ſcholar, that can read that queſtion of the phariſee's, and the determination of our bleſſed Saviour, about divorces, and conclude after all, that the marriages there ſpoken of, might be ſuch marriages as never were conſummated, as well as ſuch as were. It is impoſſible to miſtake ſo plain a caſe, without a good deal of learning and ſtudy. My Lord, it ſtirs me to a little indignation, and gives me a concern ſomewhat beyond my fee, to hear this marriage-contract of ours treated like a marriage of fourteen years ſtanding, where a man and wife have all along cohabited, and now are weary of each other, and of the common bed, and ſeeking to your Lordſhips for leave to look out for more agreeable companions. Why elſe are all theſe places of ſcripture brought againſt our bill, when not a ſingle line of them is pertinent and proper to our caſe? If they had brought the ſcripture to prove, that a boy of fifteen and a girl of thirteen, not born in paradiſe, or in the gardens of the Eaſt, but in a cold and frozen climate of the North, were of age ſufficient to diſpoſe of their perſons for ever, they had done ſomething to the purpoſe; for that, my Lords, was our age. If they had brought the ſcriptures to prove, that a boy and girl, of the years aforeſaid, repeating a certain form of words, after a certain perſon, in a church, between the hours of eight and twelve, had thereby made a contract that muſt ſtand like fate, and be irrevocable as the hours that paſſed a week ago, by any power on earth, they had done ſomething to the purpoſe, for that indeed we did. I have already owned, we ſaid what we were bid to ſay; we did what we were bid to do: we ſhould have done a great deal more, and ſaid a great deal more, had we been ordered ſo: it is not our fault, that we did not give it under our hands, that our marriage was conſummated by the words we repeated in the church; had we been aſked to do ſo, we ſurely had done it, ſuch was our innocence, ſuch was our ignorance! This, my Lords, had been the point they ſhould have laboured moſt to clear; for this they ſhould have brought their ſcripture proofs, to ſhew that the words of a marriage-contract, are, by God's appointment, as ſoon as they are uttered, of ſo binding a nature, that neither the conſent of parties, nor all the powers that are on earth, can make them null and void: that it is proper and peculiar to this contract never to be diſſolved, though nothing but words has paſſed. All other promiſes,

I muſt

I muſt ſay again, all other covenants, all other oaths, are owned to be diſſoluble by the conſent of parties, where no injury is done to any third. The marriage-words, it ſeems, are the only words in the world that operate like a charm, and take effect, in ſpite of all the reaſon, and all the new neceſſities, that can ariſe, and be urged againſt it, although the parties ſhould not have ſo much as touched each other's lips, nor ever ſhall. Here ſcripture would have done exceedingly well, and have obtained the reverence and obedience that is due to their authority, had they but ſhewn, that a verbal contract, made with ſolemnity, anſwers all the ends and purpoſes of matrimony, as it is God's ordinance; that it is not only previouſly neceſſary, both by the laws of God and man, to make the conjunction of man and woman innocent; but that the verbal contract is the thing itſelf, it is matrimony to all intents and purpoſes; and is no more to be diſſolved than it had been, had the fruit and effect of it been half a dozen children, now preſented at your Lordſhips' bar. There is no end of the abſurdities that ariſe from treating a verbal contract, that has only paſſed the lips, juſt as you would a marriage conſummated, and perfectly complete; and therefore, though I call for their ſcripture-proofs, yet I am well aſſured, none can be brought to prove a point ſo unreaſonable. But to hear them heap up ſcripture upon ſcripture, to prove that marriage is God's ordinance; that marriages are ſacred contracts; that by the laws of Chriſt they cannot be diſſolved but for the cauſe of fornication; is, in my humble opinion, to hear them ſay nothing to the purpoſe, unleſs thoſe ſcriptures mean, that marriage not conſummated is God's ordinance; that marriage-contracts are ſacred, although the very end and meaning of the contract is not anſwered; and that marriages which Chriſt there ſpeaks of as indiſſoluble (except for the ſake of adultery) are ſuch marriages as never were conſummated. In ſhort, if becauſe the word marriage is a word that is common to a marriage before it is conſummated, and alſo after, therefore whatever is applicable to a conſummated marriage, is alſo applicable to a marriage not conſummated; if this be a conſequence, a reaſonable man will be aſhamed hereafter of making conſequences. We may as well conclude, that becauſe *Caius* is a man, and *Titius* is a man, therefore *Caius* and *Titius* are one and the ſame man. They tell us alſo, from the ſcriptures, that matrimony ſignifies to us, the myſtical union there is betwixt Chriſt and his Church; but let them ſay it, if they think fit, that matrimony not conſummated does, or can ſignify this union: but in this I

ſpare them and indeed myſelf, not daring to ſpeak with any freedom on this ſubject; and finding I have already tranſgreſſed too far, I humbly deſire your Lordſhips to conſider, Whether there ever was ſo equitable a cauſe of divorce within the walls of this houſe. It is ſo ſingular a caſe, that it cuts off all your fears of it becoming an example: the oldeſt lawyer living never heard the like in all reſpects; nor will the youngeſt ever live to ſee it made a precedent: but were there twenty ſuch like caſes now before you, they are ſo reaſonable and juſt, that they would every one deſerve to be relieved by your Lordſhips; and it is below the dignity of the legiſlative power to be afraid of making precedents, where there is reaſon, juſtice and compaſſion on their ſide. To all which we lay as ſtrong a claim, as ever parties did that ever were before this houſe.

Theſe arguments were ineffectual, the diſſolution was negatived by two voices only. 47 Yeas, 49 Noes.

INSURRECTION in 1663.

To the Editor of LEGAL RECREATIONS.

SIR,

"HAVING, with ſome labour, combined "the moſt circumſtantial accounts of the famous conſpiracy "of 1663, I take the liberty of offering it to you for "your very uſeful and entertaining publication. Its con-"nexion with *Twyn*'s trial[a] may make it deſirable to be "inſerted in your Collection.

"Your Humble Servant,

March 10, 1793. "R. LOMAX."

An ACCOUNT *of the Inſurrection in* Yorkſhire, *in the year* 1663, *and the means taken to quell the ſame—from* Drake's Eboracum, Clarendon's Continuation of his Life; Kelyng's Reports—and *Lord* Arlington's Letters, *printed in the* Miſcellanea Aulica.

THE leaders of this inſurrection (according to *Drake*[b]) were all conventicle-preachers, who (under pretence of relieving themſelves from exciſe and ſubſidies—of eſtabliſhing

[a] Ante, p. 260. [b] *Eboracum* p. 174.

bliſhing a goſpel magiſtracy and miniſtry—of reſtoring the long parliament, and reforming all orders and degrees of men, eſpecially lawyers and clergy) printed and diſperſed *a call to rebellion*, beginning with theſe words, "If there be any city, town or county in theſe nations that will begin this righteous and glorious work," &c.

At this time (1663) the king was weary of the continual diſcourſe of plots and inſurrections, and reſolved to leave the peace of the kingdom to the care of the civil magiſtrates and the officers of militia; and to avoid the reproach of the late times, "of contriving plots only to commit men to priſon againſt whom there was any prejudice," he totally neglected the firſt information of this ſedition. But when intelligence was received of the time and place of rendezvous, and the intention to ſeize upon the city of *York*, and that ſome men of eſtate and fortune were engaged in the plot, his majeſty thought it time to provide againſt it, and not only recommended the care of it to the Lord Lieutenants of the counties adjacent; but ſent likewiſe ſeveral troops of his horſe to poſſeſs the city of *York* before the day appointed.

In *October* 1663, a great number of the inſurgents appeared in arms at *Farnley-Wood* near *Leeds*, ſome of them (according to Lord *Clarendon*) made reſiſtance; but quickly fled and were diſperſed—many were taken, and upon their examination behaved themſelves as if they were ſure to be ſoon reſcued, for it appeared that they did believe the inſurrection would have been general throughout the kingdom, and that all the diſbanded army would have been brought together.

All the priſons in the North were ſo full, that the king thought it neceſſary to ſend to *York*, even in the depth of winter, a ſpecial commiſſion of *Oyer* and *Terminer* to examine the whole matter; his majeſty accordingly appointed Sir *Chriſtopher Turnor*, Knight, one of the Barons of the Exchequer, Sir *John Kelyng*, one of the juſtices of the King's-Bench, and Sir *John Archer*, one of the juſtices of the Common-Pleas, to go to *York*, of which in *Kelyng*'s Reports, there is this memorandum: "About a week before *Chriſtmas* there was a meeting of the two Chief Juſtices, Lord *Hyde* and Lord *Bridgeman*, my brother *Turnor*, myſelf and my brother *Archer*, Sir *Geoffery Palmer*, the king's Attorney, and Sir *Heneage Finch*, the king's Solicitor. We did thereupon debate ſeveral things, previous to the commiſſion to *York*, which were agreed by us all," viz.

"That

* Page 15.

That if ſeveral perſons do agree to levy war, and ſome of them do actually appear in arms, and others do not, this is an actual levying of war in all of them, as well thoſe who were not in arms as thoſe who were, if they be proved to be of the plot with them who did actually appear in arms: for there can be no acceſſaries in treaſon, and therefore all that are in the conſpiracy are equally guilty."

(Their conſtruction upon 13 *Cha.* II. c. 1. "An act for the ſafety and preſervation of his majeſty's government," &c. being obſolete, is omitted here).

"It was reſolved that if perſons do actually levy war, ſo that they may be indicted for the treaſon of levying war, within the ſtatute of the 25 *Ed.* III. yet they may be indicted for compaſſing the king's death, and their actual levying of war may be laid as an overt act to prove the compaſſing the king's death."

"It was agreed that to make a miſpriſion of treaſon, there muſt be a knowledge of the deſign, and of the perſons or ſome of them, for a man cannot be ſaid to conceal what he doth not know; therefore if one tell *A. B.* in general that there will be a riſing without acquainting him with the perſons who are to riſe, or with the nature of the plot, if *A. B.* conceal this, this is no miſpriſion of treaſon, becauſe he hath no knowledge of the treaſon."

"It was agreed that if one knew of a treaſon, and knew ſome of the conſpirators, and then told other men in general terms that there will be a riſing, &c. without a diſcovery of the plot or the traitors, ſuch diſcourſe will not acquit him from miſpriſion of treaſon by concealment of it; becauſe notwithſtanding theſe general diſcourſes, both the treaſon and the traitors are concealed by him."

"And in caſe ſuch a perſon who knoweth of the treaſon and the traitors, and diſcovers all he knoweth to another perſon who is not a privy counſellor, or a juſtice of peace, or hath authority to take examination concerning it, it was doubted whether ſuch a diſcovery would acquit him from concealing of treaſon which is miſpriſion."

The commiſſion being opened at York, the judges proceeded to the trial of the principal leaders, and although it did not appear that the bottom of the conſpiracy was diſcovered, yet the following were condemned and executed, each being found guilty by the evidence of two witneſſes[a]; *Thomas Oats*, *Samuel Ellis*, *John Nettleton*, ſen. *John Nettleton*, jun. *Robert Scot*, *William Tolſon*, *John Forſter*, *Robert*

[a] *Arlington's* Letters. 330.

bert Olroyd, *John Aſkwith*, *Peregrine Cornay*, *John Snowden*, *John Smith*, *William Aſh*, *John Errington*, *Robert Atkins*, *William Cotton*, *George Denham*, *Henry Watſon*, *Richard Wilſon*, *Ralph Rymer*, and *Charles Carr*. Several of theſe hot-headed zealots behaved very inſolently on their trials, *Cornay* had the aſſurance to tell the judge, "that in ſuch a cauſe he valued his life no more than he did his handkerchief." Two of theſe unhappy wretches were quartered and ſet upon the ſeveral gates of the city: four of their heads were ſet upon *Michlegate Bar*, three at *Borthem Bar*, one at *Walmgate Bar*, and three over the caſtle gates. Amongſt thoſe who were executed the man moſt looked up to was *Ralph Rymer*, who was held a wiſe man, and was known to be truſted by the greateſt men who had been in the rebellion. He was a ſullen man, and uſed few words to excuſe himſelf, and none to hurt any body elſe, and being a man of a good eſtate it was thought that he would not have embarked in a deſign that had no probability of ſucceſs[a].

At the trial of *John Twyn* for a treaſonable libel, *ante*, p. 261. which was clearly intended for the above deſign, Serjeant *Morton* obſerved that it was proved at *York*, "that there was a council in *London* that ſat to prepare matter for an univerſal rebellion all over *England*." At the parliament which met ſoon after the return of the judges, his majeſty thought proper to enter at large, in his ſpeech, on the ſubject of this horrible conſpiracy, and the ſeaſonable and effectual means which were taken to prevent its dreadful conſequences.

That this was a very ſerious plot may be inferred from *Ludlow*, who, in his Memoirs, ſeems to own, that there was in 1663, ſome project ſet on foot by the republicans in *England*.

CONFIRMATION OF THE CONTRACTS OF INFANTS.

INFANTS, by which the law means perſons under twenty-one years, cannot bind themſelves by any contract whatever, except for meat, drink, apparel, phyſic, and

[a] *Clarendon*'s Life, fol. 218.

and ſuch other neceſſaries, and likewiſe for his good teaching and inſtruction, whereby he may profit himſelf afterwards: if an infant runs in debt on any other account but theſe, he is not bound to pay; ſtill, however, if after coming of age he ratifies and confirms the debt, by promiſing to pay it, or by giving a new ſecurity for it or otherwiſe, then ſuch confirmation binds him in point of law, but even in this inſtance a Court of Equity will take care that ſuch ſubſequent confirmation is procured in a fair and unobjectionable manner. In the following caſe, *Hobart*, a ſchool-boy, runs in debt 59l. for burgundy, champaigne, claret, &c. In a few days after he came of age, *Gally*, who ſupplied him with theſe liquors, prevailed on *Hobart* to give him a note for the 59l. without producing any account, or delivering him a bill: the queſtion was, whether ſuch ſubſequent confirmation by *Hobart* in giving the note could bind: this caſe came before Lord Chancellor *Hardwicke*, who delivered the following decree.

A young gentleman, admitted to be an infant, and known to be a ſchool-boy at *Montigniack's French* ſchool, near *Oxford* chapel, takes it into his head to reſort to *Gally*'s coffee-houſe, or rather victualling-houſe, as all ſorts of meat and liquors were ſold there; and the maſter of it ſuffers a ſchool-boy, juſt turned of twenty, to contract a debt of 59l. in the ſpace of five months, from *April* 1735 to the *September* following, when his allowance in pocket-money by the guardian was only ſeven ſhillings a week, and in my opinion very ſufficient.

The things for which he contracted the debt, were for meat either for himſelf, his friends, or his dog, or for liquors ſent to his lodging, which was the ſchool; in one day claret to the amount of 3l. burgundy 1l. 10s. champaign, 2l. 7s. in the whole 6l. 17s. 1l. 15s. was charged another day for rack punch ſent to his lodging; another day coffee and jellies, which, if it had reſted there, might have been excuſeable, if done once or twice only; but it was by no means commendable to give an infant ſuch long credit as ſix months for even theſe things.

The defendant *Gally*'s telling Mr. *Montigniack* when he came to inquire after his ſcholar's behaviour, that it was no buſineſs of his, was a very improper anſwer to the ſchoolmaſter, and an evidence that he was doing wrong, and wanted to conceal it.

As to the young man himſelf, he appears to have been often in liquor, and the fact ſpeaks itſelf, conſidering the great

great quantity of wine, &c. which were ſo frequently ſent him.

In two or three days at moſt after *Hobart* came of age, *Gally* prevails upon him to give a note for the 59l. though no account appears to have been kept of the dealings, nor any bill delivered after *Hobart* came of age.

This caſe will turn upon two general conſiderations:

Firſt, As to the tranſactions between *Hobart* and *Gally* before the promiſſory note was given, and before he was of age.

Secondly, On the alteration that has been made, by a promiſſory note being given, and upon the circumſtances at the time it was given.

As to the firſt, they are tranſactions of ſuch a nature, as ought to be diſcountenanced in a Court of Equity.

The law lays infants under a diſability of contracting debts, except for bare neceſſaries, and even this exemption is merely to prevent them from periſhing[a].

The reaſon why the law lays them under ſuch reſtrictions, is to prevent their being impoſed upon, unknown to their parents or guardians.

Neither law nor equity know any difference between an infant of ſixteen or ſeventeen, and one turned of twenty, there being a preciſe time fixed for their coming of age, and the latter may be equally relieved with the former: for, till he arrives at twenty-one, he is conſidered as an infant.

From all the circumſtances of the caſe which I have ſtated before the giving of the note, it is very plain, that the

[a] But an infant living with, and properly maintained by, a parent, cannot be bound even for neceſſaries. Thus Miſs Pickering lived with her mother, and was properly maintained by her: but in the courſe of two years ſhe contracted a debt of 30l. with the defendant, who was a millener. The queſtion was, whether ſhe was liable as being a debt contracted for neceſſaries. It was determined by Juſtice *Gould*, That if an infant lives with her parent, who provides ſuch apparel as appears to the parent to be proper, ſo that the child is not left deſtitute of cloaths, or other neceſſaries of life, I apprehend that the child cannot bind herſelf to a ſtranger even for what might otherwiſe be allowed as neceſſaries: for no man ſhall take upon himſelf to dictate to a parent what cloathing the child ſhall wear, at what time they ſhall be purchaſed, or of whom. All that muſt be left to the diſcretion of the father or mother: and as there is not here any pretence but that the child was decently provided for by her mother, I think we ſhould give no countenance to ſuch perſons, as inveigle young women into extravagance under the pretext of furniſhing them with neceſſaries, without the conſent of the parent. *Bambridge* againſt *Pickering*, Common Pleas, 2 Sir *Wm. Blackſtone's Reports*, 1325. M. T. 1780.

the defendant acted *mala fide* by giving evaſive anſwers, and by endeavouring to ſecrete what he was tranſacting with the infant.

As to the ſecond point:

It is truly ſaid, on the part of the defendant, that if an infant takes up goods before he comes of age, and gives a note for it after he is of age, if there is no fraud, it is good at law.

It has been likewiſe ſaid the executor of *Hobart* the plaintiff is a mere volunteer; but I ſhall not conſider him as ſuch, for, as ſtanding in the place of *Hobart* (who, if he had been living, and had waked out of his drunken ſleep, might have been relieved), he is equally intitled to relief as ſuing in his right.

Where it is manifeſt there has been an unconſcionable bargain made with an infant before he comes of age, the taking a note of hand from him in two or three days after he is of age, to ſubſtantiate it, is a ſuſpicious circumſtance, and has always been a material ingredient to direct the conſcience of this Court.

It is very ſtrange, that there ſhould be no account ſubſiſting for dealings of five months, nor any pretence of a bill delivered after *Hobart* came of age, nor is there any evidence that a bill lay before him for his conſideration, at the time he gave the note.

So that here is a note without any previous conſideration, which, to eſtabliſh, would be contrary to the rules of this Court.

If the care and education of youth have been thought of conſequence in former ages, or of public concern by the parent, to give any encouragement to a tranſaction of this kind, would intirely defeat that care, and be extremely fatal to the health, the manners, and every thing elſe that is valuable in young perſons.

The caſe the neareſt to this, is the impoſition upon young heirs, in the life-time of their anceſtors, who though of full age at the time of the fraud, yet if his neceſſities, extravagancies, or the ſeverity of his parents, made him ſubmit to the impoſition, this court will give relief merely to diſcourage attempts of this nature.

I think it neceſſary to make an example of the defendant in *Weſtminſter-hall*, as it is ſo near a neighbour of *Weſtminſter-ſchool*; and, upon the whole circumſtances of the caſe, do decree the note to be delivered up to the plaintiff to be cancelled. 2 *Atkyn's Reports*, *Chancery* 34. 1740.

VALIDITY

VALIDITY OF GRATUITOUS COMPENSATIONS FROM WARDS TO GUARDIANS.

IF a ward immediately after coming of age, and before ſettling accounts with his guardian, binds himſelf to pay his guardian any ſum of money, or annuity; it will be deemed to be done by improper influence, or impoſition, and a Court of equity will relieve the ward from ſuch obligations: but after the ward comes of age, and is actually in poſſeſſion of his eſtate, he may with his eyes open, make any grant he pleaſes: the Court of equity only guards againſt the guardian impoſing terms on the ward, at the time of delivering up the eſtate and accounting.—Thus

Hylton the plaintiff had conſiderable gifts or proviſions left to him by the will of *Philippa Downes* his aunt, and *Charles Palmer* his half brother. The defendant *Hylton* his uncle, was acting executor and truſtee in both thoſe wills, and alſo acted as guardian to him during his minority, having neither father or mother. Young *Hylton* coming of age in *April* 1746, he in *October* 1747, entered into a tranſaction with his uncle, whereby he granted to his uncle an annuity of 60l. gave him a general releaſe and two written diſcharges, all ſigned the ſame date with the grant, upon his delivering up ſeveral papers.

Young *Hylton* now applied to the Court of Chancery to ſet aſide this grant of annuity upon the general principles of being made juſt after coming of age, without being thoroughly informed; and it was argued in his behalf that it is not neceſſary to prove impoſition, for theſe voluntary grants have not been allowed in ſeveral inſtances: and are to be compared to a gift to an attorney, pending the ſuit; ſo of marriage-brokage bonds. In the caſe of *Pierce* againſt *Waring*, *Nov.* 13, 1745. Mr. *Hall* coming of age made a preſent to his guardian of 3500l. ſtock; it was ſet aſide on the general principles, from the dangerous conſequences, if a guardian is allowed to take preſents, before he delivered over every thing; for that it was an honourable truſt,

truſt, for which the law would allow them nothing; as that would induce guardians to flatter the paſſions of their pupils; and it was ſet aſide from being retained by him on pretence of trouble during his minority, in the management of the truſt; and that caſe is not ſo ſtrong as the preſent.

For defendant, the uncle, it was ſaid, there were particular circumſtances diſtinguiſhing this from the common caſe; that all was fair, and the defendant delivered up all the eſtates under both wills, and what more would the plaintiff have? That it proceeded freely and voluntarily from the bounty of the plaintiff, and for ſervices done, and to relieve the diſtreſſes of his uncle and guardian; and that there appeared a letter from the plaintiff to the defendant uſing many kind and favourable expreſſions, and ſhewing that he thought the defendant had acted fairly.

Lord Chancellor. The queſtion is, Whether the plaintiff is in this Court intitled to be relieved totally againſt the grant, or whether it is to ſtand for the whole or any part. The grounds for relief are firſt the general grounds and principles allowed in this Court: next particular grounds from circumſtances in this caſe.

The general grounds to be relieved againſt this annuity are certainly of ſuch a kind, as the Court has allowed in other inſtances, provided the circumſtances of this caſe came up to the rule laid down therein. Where a man acts as guardian, or truſtee in nature of a guardian, for an infant, the Court is extremely watchful to prevent that perſon's taking any advantage immediately upon his ward or *ceſtuy que truſt* coming of age, and at the time of ſettling accounts or delivering up the truſt; becauſe an undue advantage may be taken. It would give an opportunity either by flattery or force, by good uſage unfairly meant or by bad uſage impoſed, to take ſuch advantage; and therefore the principle of the Court is of the ſame nature with relief in this Court on the head of public utility, as in bonds obtained from young heirs, and rewards given to an attorney pending a cauſe, and marriage brokage-bonds. All depend on public utility; and therefore the Court will not ſuffer it, though perhaps in a particular inſtance there may not be actual unfairneſs. Upon that ground I went in the caſe cited, *Pierce* and *Waring*; in which I have added at the end of my note taken at the hearing of the cauſe, "to be abſolutely ſet aſide, being between a guardian and his ward juſt come of age, and on reaſon of public utility." How does this caſe ſtand? The

defendant

defendant appears to ſtand in the place, not of a common truſtee barely of a particular eſtate, but as a truſtee acting in fact as guardian for a minor his nephew, and taking care of his perſon and his eſtate; ſo that the condition of theſe perſons, the plaintiff and defendant, comes within this rule. Next conſidering the nature of the tranſaction, which was when the plaintiff was about twenty-two, the reſult is, (and this brings it within *Pierce* againſt *Waring*), that at the very time this uncle, who was truſtee and acted as guardian, pretended to come to an account and deliver up eſtates the plaintiff was entitled to, he took a voluntary beneficial grant of an annuity from this ward of his. That is the very time, at which there is the beſt opportunity to take the advantage of getting ſuch a bounty as this; for at that very time the eſtate is to be accounted for and delivered up. The thing beſpeaks itſelf. "I will not deliver up the eſtate you are entitled to, and account, unleſs you grant me this." Beſides it appears to be a previous deſign of the guardian here, and that he ſtipulated and haggled for that annuity at that very time, when a truſtee ſhould avoid it. The rule of the Court as to guardians is extremely ſtrict, and in ſome caſes does infer ſome hardſhip; as where there has been a great deal of trouble, and he has acted fairly and honeſtly, that yet he ſhall have no allowance: but the Court has eſtabliſhed that on great utility, and on neceſſity, and on this principle of humanity, that it is a debt of humanity that one man owes to another, as every man is liable to be in the ſame circumſtances. Undoubtedly, if after the ward or *ceſtuy que truſt* comes of age, and after being actually put into poſſeſſion of the eſtate, he thinks fit, when *ſui juris* and at liberty, to grant that or any other reaſonable grant by way of reward for care and trouble, when done with eyes open, the Court could never ſet that aſide: but the Court guards againſt doing it at the very time of accounting and delivering up the eſtate, as the terms: for the Court will not ſuffer them to make that the terms of doing their duty. This caſe therefore is within thoſe general principles.

Next as to the particular circumſtances relied on to diſtinguiſh this out of the general rule, I am of opinion, that all bear againſt that, and tend to ſhew actual impoſition on the part of the guardian. It does not appear, that the nephew was in circumſtances to grant this clear annuity, any more than the uncle was to provide for himſelf; as to whoſe ability there is nothing in proof, except what ariſes from the plaintiff's letter. The circumſtances plainly

ſhew, the guardian would not part with the eſtate, until he was ſure of this grant: then there is a ground to go not only upon the general principles, but to ſhew that the defendant did actually make uſe of that influence. The plaintiff's letter and his kind expreſſions therein ſhew, he was impoſed upon, thinking every thing was ſurrendered up, whereas the legal eſtate is ſtill in the guardian, nor is there any evidence of an account made up of the perſonal eſtate proved to have come to his hands. Certainly, if any thing could make ſuch a tranſaction ſupportable, it muſt be, where there was a real and fair account; of which there is no evidence: yet a general releaſe is given upon delivering up ſeveral papers and vouchers, as they are called.

Therefore on the general rule, and nature of this particular caſe, and the deluſion and deception under which the plaintiff was, this grant ought to be ſet aſide with coſts; and a conveyance, and an account, if the plaintiff prays it. *Hylton* againſt *Hylton*, *Chancery*, 2 *Veſey's Reports*, 547, 1754.

Ex. Em. 5.

END OF THE FIRST VOLUME.

ERRATA.

Page 8, laſt line, for *preſent* read *late.*

33, laſt line, for *juſtices* read *juſtice.*

63, line 24, for 30l. read 50l.

80, line 18, for *ſpirital* read *ſpiritual.*

202, line 37, After the words *burned alive* inſert a note (d) *This puniſhment has been altered by ſtatute* 30 Geo. III. *c.* 48. 1790, *to hanging.*

207, line 29, for *Sanctaries* read *Sectaries.*

305, line 21, for *heedleſs* read *headleſs.*

350, line 18, for *pear* read *year.*

371, line 12, for *or* read *of.*

410, line 7, for *de*, read *be.*

411, line 29, for *grnund* read *ground.*

412, line 31, after the words *perfectly right*, inſert 2 *Douglaſs's Reports, p.* 735, 1781.